

Appeals Hearing

(Open Session)

ICC-01/13

1 International Criminal Court  
2 Appeals Chamber  
3 Situation: Registered Vessels of the Union of the Comoros, the Hellenic Republic  
4 and the Kingdom of Cambodia - ICC-01/13  
5 Presiding Judge Solomy Balungi Bossa, Judge Chile Eboe-Osuji,  
6 Judge Howard Morrison, Judge Piotr Hofmański and  
7 Judge Luz de Carmen Ibáñez Carranza  
8 Appeals Hearing - Courtroom 1  
9 Wednesday, 1 May 2019  
10 (The hearing starts in open session at 9.31 a.m.)  
11 THE COURT USHER: [9:31:25] All rise.  
12 The International Criminal Court is now in session.  
13 Please be seated.  
14 PRESIDING JUDGE BOSSA: [9:32:08] (Microphone not activated)  
15 THE COURT OFFICER: [9:32:15] Good morning, your Honours.  
16 The situation on Registered Vessels of the Union of the Comoros, the Hellenic  
17 Republic and the Kingdom of Cambodia, ICC reference ICC-01/13.  
18 And we are in open session.  
19 PRESIDING JUDGE BOSSA: [9:32:31] Thank you. (Microphone not activated)  
20 THE INTERPRETER: [9:32:40] Microphone, please.  
21 MR STEWART: [9:32:44] Good morning, Madam President, your Honours. For the  
22 record my name is James Stewart, Deputy Prosecutor, and I'm appearing with  
23 Fabricio Guariglia, director of the Prosecution Division; Matthew Cross, appeals  
24 counsel, Nivedha Thiru, associate appeals counsel; and Amitis Khojesteh, situation  
25 analyst.

1 PRESIDING JUDGE BOSSA: [9:33:04] Thank you.  
2 The Government of the Union of the Comoros, please.  
3 MR DIXON: [9:33:09] Good morning, Madam President, your Honours.  
4 Rodney Dixon, appearing on behalf of the Government of the Union of the Comoros,  
5 assisted by co-counsel Haydee Dijkstal; from Stoke White Ltd, the instructing  
6 solicitors, Hakan Camuz and Yakup Bozdog; from the Comoros, Mr Mohamed Said  
7 Youssouf, who was the person who provided the instruction to refer the case in the  
8 first place in 2013 and has taken care of the case thereafter; and from Elmadag law  
9 firm, Mr Cihat Gökdemir, who received the first instruction, and Mr Ugur Yildirim.  
10 Thank you, Madam President.  
11 PRESIDING JUDGE BOSSA: [9:33:58] Thank you.  
12 Can we now have the Legal Representative of the victims, please.  
13 MR DIXON: [9:34:06] Yes, Madam President. On behalf of the Legal  
14 Representatives of the victims, Rodney Dixon, assisted by co-counsel Haydee Dijkstal,  
15 and from Stoke White Ltd, Hakan Camuz and Mr Yakup Bozdog.  
16 PRESIDING JUDGE BOSSA: [9:34:22] Thank you.  
17 The Office of Public Counsel for Victims, please proceed.  
18 MS MASSIDDA: [9:34:27] Good morning, Madam President, your Honours. From  
19 the victims represented by the Office of Public Counsel for Victims appearing today,  
20 Ms Ludovica Vetrucchio, legal officer; Mr Alejandro Kiss, legal officer;  
21 Ms Natia Katsitadze, legal professional; Ms Ana Peña, case manager;  
22 and myself, Paolina Massidda, principal counsel.  
23 PRESIDING JUDGE BOSSA: [9:34:50] Thank you, Counsel.  
24 The Appeals Chamber is convened to hear oral submissions in the appeal  
25 of the Prosecutor against the decision of the Pre-Trial Chamber I of 15 November 2018

1 entitled, "Decision on the Application for Judicial Review by the Government of the  
2 Union of the Comoros".

3 The oral submissions are intended to assist the Appeals Chamber in its deliberations  
4 over the issues arising in the appeal.

5 By way of background for the benefit of anyone who may not be very familiar with  
6 the matter before us or its context, I will briefly recount the events leading up to these  
7 proceedings.

8 On 14 May 2013, the Government of the Union of the Comoros referred  
9 the Prosecutor the situation with respect to the 31 May 2010 Israeli raid on the  
10 humanitarian aid flotilla bound for the Gaza Strip.

11 On November 6, 2014, the Prosecutor determined that there was no reasonable basis  
12 to proceed with an investigation and decided to close the preliminary examination.

13 In particular, the Prosecutor concluded that, while the information available provided  
14 a reasonable basis to believe that war crimes under the Court's jurisdiction had been  
15 committed in the context of interception and takeover of the vessels Mavi Mamara  
16 and Eleftheri Mesogios/Sofia by soldiers of the Israeli defence force on 31 May 2010,  
17 the potential cases that would likely arise from an investigation into the situation  
18 would not be of sufficient gravity to justify further action by the Court and would  
19 therefore be inadmissible pursuant to Articles 17(1)(d) and 53(1)(b) of the Statute.

20 On January 29, 2015, the Union of the Comoros made the first request to the  
21 Pre-Trial Chamber to review the decision of the Prosecutor pursuant to Article 53(3)(a)  
22 of the Statute, on the grounds that (i) the Prosecutor failed to take into account facts  
23 which did not occur on the three vessels over which the court had jurisdiction; and (ii)  
24 that the Prosecutor erred in not addressing factors relevant to the determination of  
25 gravity under Article 17(1)(b) of the Statute.

1 On July 16, 2015, the Pre-Trial Chamber, by majority, rendered the initial decision  
2 requesting the Prosecutor to reconsider her decision not to initiate an investigation.  
3 The Chamber identified five errors that together were considered to have materially  
4 affected the validity of the Prosecutor's conclusion.

5 On 27 July 2015, the Prosecutor filed a notice of appeal against the 16 July 2015  
6 decision of the Pre-Trial Chamber.

7 On 6 November 2015, the Appeals Chamber dismissed the Prosecutor's appeal  
8 in limine, finding that the impugned decision was not one with respect to  
9 admissibility within the meaning of Article 82(1)(a) of the Statute.

10 On 29 November 2017, the Prosecutor filed her final decision pursuant to Rule 108(3)  
11 of the Rules. The Prosecutor concluded that having carefully analysed the request,  
12 the report, and the other information available, the Prosecution remains of the view  
13 that there is no reasonable basis to proceed with an investigation under Article 53(1)  
14 of the Statute, and that the preliminary examination must be closed.

15 On 23 February 2018, the Union of the Comoros filed an application for judicial  
16 review for a second time and requested the Pre-Trial Chamber to review  
17 the Prosecutor's final decision not to open an investigation and to direct  
18 the Prosecutor to reconsider it.

19 On 15 November 2018, the Pre-Trial Chamber issued the impugned decision, in which  
20 it requested the Prosecutor to reconsider the final decision not to open an  
21 investigation in accordance with its July 2015 decision.

22 On 21 November 2018, the Prosecutor filed her request for leave to appeal the  
23 impugned decision. On 26 November 2018, the victims represented by  
24 Ms Paolina Massidda, the Comoros, and the victims represented by Mr Rodney Dixon,  
25 filed their respective responses.

1 On January 2019, the Pre-Trial Chamber granted leave to appeal in relation to the  
2 following issues:

3 (i) whether the Pre-Trial Chamber may find that a decision by the Prosecutor further  
4 to a request for reconsideration pursuant to Article 53(3)(a) of the Statute cannot be  
5 considered to be final within the meaning of Rule 108(3) of the Rules of Procedure  
6 and Evidence in circumstances in which the Prosecutor has not, in the view of the  
7 Pre-Trial Chamber, carried out her reconsideration in accordance with the  
8 aforementioned request.

9 And (ii) whether the Prosecutor, in carrying out a reconsideration under  
10 Article 53(3)(a) of the Statute and Rule 108, is obliged to accept particular conclusions  
11 of law or fact contained in the Pre-Trial Chamber's request, or whether she may  
12 continue to draw her own conclusions provided that she has properly directed her  
13 mind to these issues.

14 On 11 February 2019, the Prosecutor filed her appeal brief and on 4 March 2019, the  
15 Comoros, the Legal Representative of the Victims and the Office of Public Counsel for  
16 Victims filed their respective responses.

17 That is the end of the brief history regarding these proceedings.

18 I now move to the conduct of the proceedings.

19 Turning now to the conduct of these proceedings, it is recalled that on 18 April 2019,  
20 the Appeals Chamber issued an order setting out questions which it wishes to hear  
21 counsel address during their submissions. The order also indicated the time  
22 allocation in this respect. The proceedings will thus be conducted in accordance  
23 with that schedule.

24 Before we begin with hearing counsel, I would like to instruct the parties and  
25 participants on a few modalities with respect to the hearing.

1 Counsel are urged to avoid repetition of arguments already made in their filings. In  
2 addressing the issues, counsel should be guided by the questions set out in the order  
3 of 18 April 2019. Counsel are free to speak to those questions in the manner that is  
4 most convenient to them.

5 To help us manage time and cover more ground, counsel are strongly encouraged to  
6 refrain from covering ground already covered by those who spoke earlier; unless  
7 there is a substantial disagreement in a way that requires more to be said. When  
8 there is agreement, it will suffice simply to say so and move on to other topics.

9 May I also remind counsel that they are expected to complete their submissions  
10 within the indicated time frame regardless of questions from the Bench. The  
11 court officer will be monitoring the time and will indicate to the party or participant  
12 five minutes before the end of the allocated time.

13 The time allocation is based on three court sessions. This session will proceed until  
14 11 a.m. and we will thereafter break for 30 minutes. In this session, we will proceed  
15 with the subjects identified under the Group A questions.

16 We will resume the second session at 11.30 and then break for one hour at 1330.

17 In this second session, we will address the remaining submissions relating to Group  
18 A and begin the submissions under the Group B questions.

19 In the third session, which will start at 14.30 until 16.30, we will address the questions  
20 under Groups C and D and hear closing submissions.

21 Without further ado, I will now call upon Judges Eboe-Osuji and Morrison  
22 respectively to recite for the purposes of the record the questions proposed by  
23 the Chamber in its order of 18 April 2019.

24 Thank you.

25 JUDGE EBOE-OSUJI: [9:44:41] The first group of questions, Group A, pertain to

1 applicable law and judicial power.

2 Question: What, if any, is the relationship and effect of the Appeals Chamber's 2015  
3 decision on the present appeal proceedings (in particular the effect of the reasoning of  
4 the majority for dismissing the appeal *in limine*)?

5 Question: As a general principle of law, judicial decisions of the Court shall be  
6 respected and complied with. Please mark that, "a general principle of law".

7 The Appeals Chamber notes paragraph 13 of the Prosecutor's decision of  
8 30 November 2017, in which the Prosecutor contends, amongst other things, that  
9 based on her own independent analysis of the law, quote, "the Prosecution cannot  
10 concur with the majority of the Pre-Trial Chamber" unquote; that she, "respectfully  
11 disagrees with the legal reasoning in the Pre-Trial Chamber's request concerning:  
12 The standard applied by the Prosecution under Article 53(1), the standard of review  
13 applied by the Pre-Trial Chamber under Article 53(3) and the considerations relevant  
14 to the substantive analysis carried out by the majority," unquote, and that she, quote,  
15 "cannot simply follow the approach of the Pre-Trial Chamber's request," unquote.

16 In light of the general principles of law mentioned earlier, does the Prosecutor's  
17 contention amount, or not, to non-compliance with the Pre-Trial Chamber's request  
18 for reconsideration, which is a judicial decision that has force and effect?

19 When requested by the Pre-Trial Chamber to reconsider a decision not to initiate an  
20 investigation, Rule 108 of the Rules of Procedure and Evidence stipulates that  
21 the Prosecutor quote, "shall reconsider that decision as soon as possible." Unquote. In  
22 reconsidering the decision, does the Prosecutor have discretion to disregard the  
23 directions of the Pre-Trial Chamber in this respect?

24 Question: What would be the consequence of non-compliance by a party with  
25 a judicial decision of the Court and the effect of Regulation 29 of the Regulations of

1 the Court in this regard?

2 Question: What, if any, was the legal basis for the Government of the Union of the  
3 Comoros to seize Pre-Trial Chamber I on 23 February 2018 with a request for a second  
4 review of the Prosecutor's decision of 30 November 2017?

5 Question: Under Article 53(3)(a) of the Statute, the Pre-Trial Chamber is empowered  
6 to, quote and unquote, "review" a decision of the Prosecutor not to proceed with an  
7 investigation. Is the power to review in this context akin to the power of the  
8 Appeals Chamber under Article 83(2) of the Statute?

9 Question: May the Pre-Trial Chamber resort to its "inherent powers", quote and  
10 unquote, to overturn the final decision of the Prosecutor pursuant to Article 53(3)(a)  
11 of the Statute and Rule 108 of the Rules?

12 Question: In deciding whether to initiate an investigation, Article 53(1) of the Statute  
13 at paragraphs (a) and (b), requires the Prosecutor to assess whether, quote, "a crime  
14 within the jurisdiction of the Court has been or is being committed", unquote, and if,  
15 quote, "[t]he case is or would be admissible under Article 17". Unquote.

16 In that scenario:

17 Who is empowered to make a final ruling on the jurisdiction or admissibility, is it  
18 the Prosecutor or the relevant Chamber?

19 Does the Prosecutor and the Chamber have the same power in this respect?

20 Question: What is the relationship, if any, between the wording of Article 53(1)(b)  
21 of the Statute, which stipulates that, quote, "the Prosecutor shall consider whether  
22 '[t]he case is or would be admissible under Article 17'", and the wording of Article  
23 17(1) of the Statute, which stipulates that, quote, "... the Court shall determine that  
24 a case is inadmissible ..."? Unquote.

25 Does the word "consider", quote and unquote, in Article 53(1)(b) endow



1 the Prosecutor with the same authority as that of the Chamber to, quote and unquote,  
2 "determine" whether a case is inadmissible under Article 17 of the Statute?

3 Regarding the Prosecutor's actions generally, and her decision pursuant to Rule 108 of  
4 the Rules in particular, are these administrative or judicial in nature?

5 Question: If judicial in nature, does the final decision have the effect of being  
6 *res judicata*?

7 That is the end of that group of questions. Thank you, Madam President.

8 JUDGE MORRISON: [9:51:36] Now turn to Group B questions, which is the  
9 Prosecutor's implementation of the request for reconsideration.

10 A. Did the Prosecutor's decision of 30 November 2017, effectively and not just  
11 formally, address the five errors identified by the Pre-Trial Chamber?

12 B. In assessing the scale of the crimes, did the Prosecutor apply a differential  
13 standard by relying on factors in the Abu Garda case that appear to treat the victims  
14 of that case better than the victims of the flotilla and those in Gaza?

15 C. In the Abu Garda case the Prosecutor based her assessment of the impact of the  
16 alleged crimes not only on the peacekeepers and their families but extended it to  
17 include, quote, a "large number of civilians deprived of protection more widely  
18 because of the disruption to the peacekeepers' operations". That was from  
19 the Prosecutor's decision of 30 November. In contrast in the case at hand, the  
20 Prosecutor limited her assessment of the impact of the crimes to the flotilla passengers  
21 alone and excluded the victims in Gaza. What is the reason for this differential  
22 assessment and how does the Prosecutor's approach comport with Article 21(3)  
23 of the Statute and recognised international human rights law?

24 D. Is the Prosecutor's assessment of the crimes in this case in contradiction with her  
25 position regarding the crimes alleged to have taken place in Myanmar and

1 Bangladesh?

2 E. With regard to the Prosecutor's argument, at paragraph 141 of the Prosecutor's  
3 decision of 30 November 2017 that the alleged misconduct conducted on Israeli soil  
4 cannot be associated with the alleged crimes committed on board the Mavi Mamara  
5 because, quote:

6 "In such circumstances, the alleged subsequent misconduct, even if true, cannot be  
7 rationally associated with the identified crimes aboard the Mavi Mamara, for the  
8 purpose of assessing the gravity of any potential case arising from the situation.

9 While there is a continuum between the victims of the alleged conduct, the link  
10 between the groups of alleged perpetrators is tenuous - they are united only by their  
11 nationality, their service to the Israeli government, and the allegations that some  
12 persons in these groups mistreated detainees. The conduct of such unrelated groups  
13 has very little or no probative value in showing a reasonable basis to believe that  
14 there was a plan or policy to commit crimes aboard the Mavi Mamara."

15 Is the Prosecutor's contention in this case in direct contradiction, not only with the  
16 notion of continuing crimes, but especially with her argument regarding the crimes  
17 alleged to have taken place in Myanmar and Bangladesh, that the "conduct"  
18 requirement in Article 12(2)(a) of the Statute means only that "at least one legal  
19 element of an Article 5 crime" must occur on the territory of a State Party?

20 F. In the absence of a substantial investigation, was the Prosecutor correct in making  
21 a "conditional determination of the lawfulness of the interpretation of the flotilla",  
22 given that the UN Human Rights Council found that the interpretation of the flotilla  
23 was per se unlawful?

24 Move to Group C questions, which concern the standard of reasonable basis to initiate  
25 an investigation.

1 A. Is the standard applied by the Prosecutor in deciding not to initiate an  
2 investigation in the matter at hand consistent with the "reasonable basis" standard  
3 under Article 15 of the Statute?

4 B. Did the Prosecutor abuse her discretion under Article 15 of the Statute when,  
5 having some "information on crimes within the jurisdiction of the Court", she decided  
6 not to open an investigation, especially in circumstances where the situation was  
7 referred by a State Party that has jurisdiction over the crimes?

8 Group D, questions concerning complementarity and the duty to end impunity.

9 A. Is the Comoros or Palestine able to effectively investigate the alleged crimes  
10 identified in the Comoros' referral and prosecute the alleged perpetrators?

11 B. Is there any other State that is able and willing to investigate the crimes identified  
12 in the Comoros' referral?

13 C. If not, has the complementarity requirement been met under paragraph 10 of the  
14 preamble read with Article 1 and 17 of the Statute?

15 D. Does a decision not to proceed with an investigation imply a denial of justice and  
16 a violation of the internationally recognised human right of access to justice?

17 E. As noted in the preamble to the Statute, the object and purpose of establishing  
18 a permanent International Criminal Court was "to put an end to impunity for the  
19 perpetrators of these crimes and thus to contribute to the prevention of such crimes".

20 In the matter at hand, by deciding not to proceed with an investigation has  
21 the Prosecutor breached the object and purpose of the Statute, especially in  
22 circumstances where a State Party has referred the situation involving alleged war  
23 crimes and crimes against humanity?

24 PRESIDING JUDGE BOSSA: [9:57:51] Thank you very much, Judge.

25 We will now proceed with the submissions of the parties.

1 Office of the Prosecutor, you have 25 minutes. You may begin now.

2 MR CROSS: [9:58:08] Good morning, your Honours, and thank you,

3 Madam President.

4 I shall be addressing the questions in Group A, and then my colleagues Mr Stewart  
5 and Mr Guariglia will address Groups B to D during the course of the day.

6 In doing so, we will depart very slightly from the order in your Honours' guidance,  
7 but we hope this will make for a logical sequence in our answers.

8 Your Honours, the allegations in this situation are serious, any criminal lawyer would  
9 say so. But the question which originally arose in this situation was whether the  
10 crimes identified by the Prosecutor for which he considers there is a reasonable basis  
11 to believe that they occurred are nonetheless sufficiently grave for investigation by  
12 this Court as opposed to any other forum.

13 Our office has now spent more than five years considering and reconsidering aspects  
14 of this situation. We have cumulatively considered information from more than 300  
15 passengers aboard the Mavi Mamara as well as other vessels in the flotilla. We have  
16 reviewed thousands of pages of information. We have submitted just about 20  
17 written filings before various Chambers of this Court. And we have also published,  
18 twice, the conclusions of our detailed analysis, the last time in a decision which was  
19 some 144 pages long and supplemented by various annexes amounting to another 90  
20 or so pages.

21 And I mention this, your Honours, simply by way of some basic illustration that we  
22 do take this situation very seriously and we always have. But, throughout its history,  
23 the litigation in this situation has also touched on a number of legal issues which we  
24 consider to be of broader constitutional importance for the Court as a whole. It is  
25 our duty, as we see it, as Prosecutors, who are bound to act in accordance with

1 the Statute, to be equally mindful of those concerns since they touch upon the limits  
2 of the mandate given to us by our States Parties.

3 One set of issues arose in the Pre-Trial Chamber's first request to the Prosecutor under  
4 Article 53(3)(a) which we sought to appeal. And a different set of issues has now  
5 arisen in the Pre-Trial Chamber's second request to the Prosecutor under  
6 Article 53(3)(a) which has led to today's proceedings.

7 The essence of today's appeal can be simply put: Does the Statute provide that it is  
8 the Pre-Trial Chamber or the Prosecutor who has the last word once  
9 a Pre-Trial Chamber has made a request under Article 53(3)(a)?

10 Considering this question brings us straight to question B, which is one of the core  
11 issues central to this appeal. While the Prosecution of course agrees that judicial  
12 decisions should be respected and complied with, the Pre-Trial Chamber's  
13 intervention raises a key question: What does compliance really mean for the  
14 purpose of Article 53(3)(a) and Rule 108(2) and 108(3). Or to put it another way, as  
15 we stated in our brief at paragraph 25, the question is not whether an Article 53(3)(a)  
16 request is binding, but, rather, the way in which it is binding.

17 Now, the Pre-Trial Chamber's view that the Prosecution had not complied with its  
18 original request was the sole justification for its conclusion that the Prosecutor's final  
19 decision must be set aside and that the Pre-Trial Chamber had the power to do so.

20 Yet, with respect to the majority of the Pre-Trial Chamber this was, in our view, based  
21 on a misapprehension. This is one of the reasons why we submit that the decision  
22 was erroneous. As Judge Kovács recognised in his dissenting opinion at  
23 paragraph 18, the Prosecutor was complying with the Pre-Trial Chamber's request by  
24 carrying out her reconsideration as soon as possible.

25 But this did not otherwise lift her obligation under the Statute to exercise her

1 independent judgment in doing so. She carried out this obligation in good faith,  
2 paying close attention to the Pre-Trial Chamber's reasoning as well as the concerns  
3 raised by the Comoros and by the participating victims. But her ultimate  
4 conclusions remained her own, as the Statute and the Rules require.

5 For this very reason, your Honours, we do not suggest that the Prosecutor has the  
6 discretion to disregard directions of the Pre-Trial Chamber in the words of question B.  
7 But we merely say that the reasoning of a Pre-Trial Chamber in an Article 53(3)(a)  
8 request does not constitute a "direction" in the first place.

9 And we say this primarily on the basis of the provisions of the Statute, interpreted  
10 according to the principles of the Vienna Convention. Not only is this Court  
11 a creature of its Statute, but the drafters were acutely aware of the sensitivity of the  
12 balance that they struck governing the opening of investigations at this Court. They  
13 regulated this question expressly and exhaustively, as multiple Pre-Trial Chambers  
14 have also previously agreed.

15 And for these points I refer your Honours to A1 in the reference list we filed  
16 yesterday afternoon. That's filing number 96.

17 Indeed, the Pre-Trial Chamber itself recognised the correctness of a similar  
18 interpretive approach when it considered the regime applicable to Article 53(4).  
19 And that's reference A2.

20 In particular, viewing the reasoning of the Pre-Trial Chamber as a binding direction to  
21 the Prosecutor would be inconsistent not only with the plain terms of Article 53(3)(a)  
22 and Rule 108(3) but also the broader context in the Statute, especially the express  
23 distinction between the procedures under Article 53(3)(a) and under Article 53(3)(b).  
24 And for that we refer your Honours to reference A3.

25 The object and purpose of the Statute and the drafting history also make plain, in our

1 view, that there was never an intention to compel the Prosecutor to make an  
2 affirmative finding under Article 53(1)(a) or 53(1)(b). And that's reference A4.  
3 Finally on this point, your Honours, we also say that the difficulty in viewing the  
4 Pre-Trial Chamber's reasoning as amounting to a direction to the Prosecutor is  
5 illustrated by the former majority's approach to certain factual issues, such as whether  
6 or not there was a reasonable basis to believe that the identified crimes form part of  
7 a plan or a policy.

8 Now, during the review of litigation, your Honours, the Pre-Trial Chamber never  
9 requested access to the information which the Prosecution had considered. That's  
10 reference A5. And that procedural step under Rule 107(2) is not essential for an  
11 Article 53(3)(a) review. This being so, how could the Pre-Trial Chamber's views on  
12 the factual matters bind the Prosecutor when only the Prosecutor has reviewed the  
13 underlying information?

14 PRESIDING JUDGE BOSSA: [10:06:54] One moment, Counsel, Judge Chile wants to  
15 intervene.

16 MR CROSS: [10:06:58] Thank you, your Honour.

17 JUDGE EBOE-OSUJI: [10:06:59] Is it really a question of who has the final word  
18 between the Prosecutor and the Pre-Trial Chamber? Or, rather, as you put it, the  
19 question of the Prosecutor being required to answer affirmatively to the direction of  
20 the Pre-Trial Chamber? Or a matter of showing what exactly it was that  
21 the Prosecutor did to show that it was reconsidering the matter as the  
22 Pre-Trial Chamber directed? Reconsidering something, requesting you to reconsider  
23 a decision is not quite the same thing as directing you to make an affirmative decision.  
24 Can you deal with that, please.

25 MR CROSS: [10:08:10] Yes. Thank you, your Honour.

1 If I may take your question in perhaps a couple of parts.

2 First off, yes, your Honours, when we got the Pre-Trial Chamber's decision, the  
3 decision which we have under appeal, we studied their language quite carefully  
4 because we were initially perhaps a little unclear whether or not they were  
5 definitively saying that the Prosecution had to reach the same conclusions, the  
6 identical conclusions on the matters of fact and law which they had addressed in their  
7 initial request.

8 We understood on balance that that was their position and on that basis we sought  
9 certification. And their certification decision, in our view, seems to make that a little  
10 clearer by certifying that issue for appeal and effectively saying, yes, the decision does  
11 mean that in their view, the majorities' view, the Prosecutor must simply, if you like,  
12 copy and paste the conclusions from the Pre-Trial Chamber's request into the  
13 Prosecutor's reconsideration.

14 We had understood from the previous litigation, including the 2015 decision of the  
15 Appeals Chamber, that that was not how the Statute should be interpreted and that is  
16 how this question has arisen. We are obviously proceeding on the basis of that  
17 understanding of the Pre-Trial Chamber's decision. And in that sense, because of the  
18 structure of 53(1)(b), which is to say it's not a discretionary decision whereby we can  
19 find certain principles of law or facts to be the case and then decide, notwithstanding  
20 those findings, we will not find that 53(1)(b) is met. The effect is that if the  
21 Pre-Trial Chamber tells us you must accept these bits of reasoning, these steps along  
22 the path, then we have to then walk down that path.

23 So in that sense, if we are obliged to accept their reasoning on particular steps, then in  
24 our understanding of 53(1)(b) we are also obliged to accept the ultimate conclusion  
25 and therefore we must find gravity.



1 JUDGE EBOE-OSUJI: [10:10:14] Does that, giving you road maps along which to  
2 travel, does it mean that you necessarily must travel as directed? Or is it a matter of  
3 saying: "Well, you asked us to consider this as a matter of interpretation of the law,  
4 we have considered that and the answer we have is this. On second road map you  
5 have asked us to consider this and give it another look, we have done that and this is  
6 our finding" and so on and so forth? Isn't that a way of looking at it? If that is  
7 a way of looking at it, what exactly did you do in that regard?

8 MR CROSS: [10:10:52] Your Honours, I think my co-counsel may touch on this  
9 subject again later in the hearing. The short answer is yes, we would accept that it  
10 was our duty to consider the reasons put forward by the Pre-Trial Chamber and deal  
11 with them appropriately, and of course we would also consider that was the case.  
12 In our view, in our final decision, we had sufficiently and adequately expressed  
13 where we were in agreement and where we were in disagreement, respectfully, with  
14 the Pre-Trial Chamber.

15 Now it may be, particularly given the nature of the Pre-Trial Chamber's subsequent  
16 decision, that we did not make ourselves as clear as we might have done in hindsight.  
17 And indeed in our certification request we formally apologised to the  
18 Pre-Trial Chamber and acknowledged that there was perhaps some room for  
19 misunderstanding in the way we had expressed ourselves.

20 But certainly we were attempting to consider the issues that they identified, but we  
21 did not agree with the conclusions that they had reached about those issues.

22 Given the time, your Honour, may I move on? I'm grateful.

23 Finally, touching now upon the Appeals Chamber's 2015 decision, this brings us to  
24 your Honours' question A. And this decision of the Appeals Chamber some four  
25 years ago also informed our view that the Prosecutor is not obliged to adopt the

1 reasoning of the Pre-Trial Chamber as binding.

2 In this earlier decision of the Appeals Chamber the majority found that the Prosecutor

3 is effectively under an obligation of process but not of result when she receives

4 a request under Article 53(3)(a). This reasoning in our view was clear and

5 unequivocal. And I refer your Honours to reference A6.

6 If the Appeals Chamber had not been of this view, and the Prosecutor was bound to

7 accept the Pre-Trial Chamber's conclusions as her own, then the first request by the

8 Pre-Trial Chamber would have been a ruling on admissibility and the Prosecutor's

9 previous appeal would therefore have been admissible after all. But this is not what

10 the majority of the Appeals Chamber previously found.

11 Likewise, while the minority opinion of the Appeals Chamber disagreed about the

12 admissibility of the Prosecutor's appeal, based primarily on the potential influential

13 effect of the Pre-Trial Chamber's request upon the Prosecution, it did not dispute that

14 the last word still remains with the Prosecutor. And that's most clear at

15 paragraph 35 of the minority opinion.

16 Now, as a more practical matter, the fact that the Prosecutor had sought the assistance

17 of the Appeals Chamber back in 2015 is also significant in demonstrating the good

18 faith in her final decision. She did not act merely on the basis of her own

19 interpretation of the procedural regime. Rather, she had sought, and obtained, the

20 guidance of the Appeals Chamber as to how she should proceed.

21 Now, turning to question C, which asks about the consequences of non-compliance

22 with the judicial decision.

23 For the reasons I have just set out, we say that this simply does not arise in this

24 situation because, in our view, the Prosecutor did comply with the

25 Pre-Trial Chamber's request by carrying out the reconsideration in accordance with

1 Rule 108(2).

2 And while we do not take issue, therefore, with Regulation 29 of the

3 Regulations of the Court, we would say that it is simply not applicable in the present

4 circumstances. In particular, the *lex generalis* of Regulation 29 did not empower the

5 Pre-Trial Chamber to depart from the *lex specialis* from Article 53(3)(a) and Rule 108(3).

6 Nor, in any event, can the regulations modify or depart from provisions of the Statute,

7 or even the Rules. Rather, they must be read to be subordinate to them.

8 Accordingly, Regulation 29 might only be applied to situations such as the present,

9 for the sake of argument, to determine whether the formal conditions of 108(3) have

10 been met. But on the facts of this situation, there is no doubt that they were, without

11 any need to enter, as the Pre-Trial Chamber did, into the substantive content

12 of the Prosecutor's analysis.

13 For similar reasons, once the Prosecutor has formally notified the Pre-Trial Chamber

14 of her final decision under Rule 108(3), there is simply, in our view, no legal basis for

15 a referring State such as the Comoros to request a further review from the

16 Pre-Trial Chamber. And this addresses your Honours' question D.

17 Indeed, when the Comoros made its request, it simply asserted that the Prosecutor's

18 final decision under Rule 108(3) was a new decision under Article 53(1), and for that

19 reason, susceptible to review under Article 53(3)(a).

20 But this is incorrect, for the reasons we have already set out at reference A7. And we

21 say it is perhaps notable that the majority of the Pre-Trial Chamber also declined to

22 adopt this position.

23 Indeed, when the Appeals Chamber now considers the nature of the

24 Pre-Trial Chamber's power under Article 53(3)(a), which is question E, we would also

25 respectfully caution against comparisons with other provisions of the Statute.

1 Rather, for some of the reasons to which I referred in the context of question B, we  
2 submit that Article 53(3)(a) should be interpreted in its own terms, according to the  
3 Vienna Convention.

4 If any analogy had to be drawn, we submit that the best analogy would be to the  
5 judicial review of executive or administrative action, as it's known in some common  
6 law jurisdictions, rather than with the mechanism for appellate review of first  
7 instance judicial decisions. And a key distinction between these two approaches lies  
8 in recognising the distinct competences and expertise of the reviewing body and body  
9 under review. And this approach would again support the view that the  
10 Pre-Trial Chamber under Article 53(3)(a) does not bind the Prosecutor to adopt its  
11 conclusions in carrying out a reconsideration.

12 But the judicial review analogy is still far from perfect. In reality --

13 THE COURT OFFICER: [10:18:04] Five minutes left for the Office of the Prosecutor.

14 MR CROSS: [10:18:07] Thank you.

15 THE COURT OFFICER: Thank you.

16 MR CROSS: [10:18:08] -- Article 53(3)(a), like Article 53 as a whole, was  
17 a tailor-made solution carefully crafted by the drafters of the Statute to regulate this  
18 particular issue.

19 For these reasons, we submit that Article 53(3)(a) should not be analogised to  
20 Article 83(2).

21 To the extent that your Honours might have noted the reference in Article 83(2) for  
22 the Appeals Chamber to remand a factual issue to the Chamber below and then for  
23 that Chamber to report back, we say this is not the same as the mechanism in 53(3)(a)  
24 for three reasons:

25 First, if the drafters had such a mechanism in mind, then they would have said so

1 expressly, just as they did for Article 83(2).  
2 Second, if Article 53(3)(a) were to be read like Article 83(2), this would effectively  
3 collapse the distinction between Article 53(3)(a) and Article 53(3)(b). And for the  
4 reasons in our brief, that's reference A8, we suggest, this must be incorrect.  
5 And third, the Statute makes clear that the Prosecutor is not in the same relationship  
6 to the Pre-Trial Chamber as a first instance judicial chamber is to the  
7 Appeals Chamber. In particular, the drafters established unique competences for  
8 the Prosecutor and the Pre-Trial Chamber which are clearly demarked from one  
9 another. And we say this is evident from Articles 13 to 15 and 53 read together as  
10 a whole.  
11 Therefore, comparing 53(3)(a) to 83(2) would be to blur this clear distinction.  
12 Very briefly, your Honours, in terms of your question F concerning inherent powers,  
13 we have addressed this largely in our brief. I can amplify slightly on that, but in the  
14 interest of time I probably won't at this stage, but we would be happy to address that  
15 any further.  
16 We also then turning to question G, you asked whether it is the Pre-Trial Chamber or  
17 the Prosecutor which has the power to make a final ruling on admissibility.  
18 In our view, the answer depends very much on how the preliminary examination was  
19 triggered in the first place. When the Prosecutor acts *proprio motu* under Article 15,  
20 then both the Prosecutor and the Pre-Trial Chamber must concur in their  
21 determinations and in that sense, the Pre-Trial Chamber does make a ruling.  
22 But by contrast, when a situation is referred to the Prosecutor under Article 14, it is  
23 the Prosecutor alone who is required and empowered to apply the legal test in  
24 Article 53(1).  
25 Any request by the Pre-Trial Chamber for the Prosecutor to reconsider her decision

1 still leaves the final decision for the Prosecutor, as illustrated by 53(3)(a) and  
2 Rule 108(3).

3 And it again does not allow the Pre-Trial Chamber to substitute its own  
4 determination because this follows from the distinction between 53(3)(a) and 53(3)(b).  
5 Consequently, while the Pre-Trial Chamber has a power of review when  
6 the Prosecutor acts under Articles 14 and 53(1)(a) and (b), it remains the Prosecutor's  
7 determination which is indispensable, and this is precisely how Articles 53(1)(a) and  
8 (b) differ from Article 53(1)(c).

9 Finally on this point, your Honours, we would also say that the Prosecutor's  
10 determination is not a ruling in the sense that we often use the term. It does have  
11 a procedural significance, but it does not, if it is a positive decision, bind the Court in  
12 any future matters raised under Articles 18 or 19. And in that sense, as  
13 your Honours have asked in question J, it is not *res judicata*.

14 Nor is the negative assessment the Prosecutor's very last word, since the Prosecutor  
15 may continue to receive new information and, if she considers appropriate, may  
16 re-open a preliminary examination at any time. That's Article 53(4).

17 Your Honours, in question H, you ask if there is a difference between the wording of  
18 53(1)(b) and 17(1) and whether that is significant.

19 Briefly, we say that there is no significant difference in wording between the two.  
20 The Prosecutor, for the purposes of Article 17, is an organ of the Court; that follows  
21 from Article 34 of the Statute.

22 And 53(1)(b) of the Statute is, to some extent, *lex specialis* for the purpose of  
23 preliminary examination. And in that context, the reference to the Prosecutor  
24 considering certain factors is consistent with the *chapeau* of 53(1), which sets out  
25 the various factors which the Prosecutor must take into account.

1 Coming to question I, asking whether the Prosecutor's role is best characterised as  
2 administrative or judicial, we would say, in my own jurisdiction in the UK, that  
3 a Prosecutor is best considered as a quasi-judicial figure. She is not a judge. She  
4 has high qualifications; she has unique functions under the statute, but she is not the  
5 same as your Honours. But for the purpose of Article 53, the Prosecutor is entrusted  
6 with a unique gatekeeping function in which she must make certain determinations  
7 fairly and in accordance with the law.

8 THE COURT OFFICER: [10:23:40] We have reached the 35 minutes, for your  
9 information.

10 MR CROSS: [10:23:44] Thank you, your Honours.

11 On that point, that concludes my submissions; unless you have any further questions.

12 PRESIDING JUDGE BOSSA: [10:23:53] Thank you very much.

13 May I now invite the Government of the Union of the Comoros to take the floor.

14 Thank you.

15 MR DIXON: [10:24:01] Thank you, Madam President, your Honours. The  
16 Government of the Comoros is most grateful for the opportunity to plead its case  
17 before the ICC Appeals Chamber.

18 Having referred the situation to the ICC as long ago as May 2013, it has indeed been  
19 a protracted and demanding engagement for the government for over six years now.  
20 This is, after all, a somewhat unlikely case for one of the smallest member States of the  
21 ICC to be referring one of the world's most powerful and well-resourced armed forces,  
22 with supporters in the very highest places, to the ICC for investigation. Something  
23 of a, you may think, David versus Goliath situation.  
24 It reflects, however, the very real value of the ICC as an international criminal court  
25 with wide and diverse jurisdictional reach as the founding states intended.

1 The case brings renewed hope, the Comoros submits, for justice and ending impunity  
2 for those most vulnerable without power at a time when it is most desired to  
3 showcase how vital should be the role of the ICC.

4 And this has all occurred as a result of the Israeli defence forces, IDF's illegal raid on  
5 the Gaza flotilla in May 2010 in international waters in the dark just before sunrise.

6 It was for all intents and purposes in respect of the Mavi Mamara, carrying over  
7 500 civilian passengers and flying the flag of the Comoros, an armed and violent  
8 invasion on to Comorian territory as it equally was for the other States.

9 The United Nations rightly took a robust stance against this infringement of  
10 sovereignty in violation of international law on the high seas and therein, as the  
11 Comoros has always stressed and we say the Prosecution has completely overlooked,  
12 an error pointed out by the Chamber below, lies at the very least the gravity of this  
13 case, making it entirely appropriate for investigation by the ICC.

14 It is plainly unacceptable for nation States to be attacking each other's civilian ships  
15 on the high seas and massacring civilian passengers. The seriousness of this case is  
16 underscored both by what happened on the Mavi Mamara and the precedent it could  
17 set for all ships sailing on the high seas that could come within the jurisdiction of the  
18 Court.

19 As the Comoros has repeatedly highlighted, what message would be sent out globally  
20 were the Prosecutor to declare that such cases are not significant enough to warrant  
21 the ICC's attention?

22 And yet, far from seizing this case as a unique opportunity, and we have seen it again  
23 respectfully in the submissions of the Prosecution, in which the ICC's jurisdiction  
24 plainly does apply, the Prosecutor continues to resist the rare chance that so often  
25 even in the best of worlds does not arise for the resolute and astute official



1 prosecuting as here on behalf of the international community.

2 Despite this exceptional prospect for the OTP, the case has surprisingly and with

3 great regret become one more of a distraction. A headache. Or, as some

4 hard-hearted opponents of it have said, tiresome.

5 In contrast, the Comoros welcomes this public examination of the key legal issues,

6 which I will address in various submissions that are relevant to the questions, not

7 question by question. It demonstrates the seriousness with which the case is and

8 should be viewed and vindicates why my client, despite all, has stuck with it for

9 many years believing in the ICC as the legitimate court of last resort.

10 Just briefly, your Honours, by way of background, the Comoros took this step of

11 elevating it to the ICC given the way in which the matter had already been taken to

12 the highest international levels by the UN and by its profile. This was obviously

13 a very serious and sensitive matter most fittingly to be investigated by an

14 international court.

15 The Comoros, in fact, took unprecedented steps for passing national legislation which

16 allowed for this matter to come before the Court.

17 The Comoros was also directly responsive to the victims on board the flotilla from

18 around the world, 37 countries, who sought to know the truth and find accountability.

19 And for this reason, acting as the lawyers for the Comoros, we have had extensive

20 interaction with the victims in gathering their information and evidence and thus

21 have been instructed by many of them to represent them too in their quest for justice.

22 I will make separate submissions on their behalf based on their specific instructions

23 hereafter.

24 My primary submission on behalf of the ICC State Party, the Comoros, which indeed

25 goes to all the questions your Honours have very helpfully asked, is that under

1 Article 53(3)(a), the Pre-Trial Chamber does have the specific power to judicially  
2 review the decisions of the Prosecutor in this case. The Chamber is not empowered  
3 to decide that the case is indeed admissible at this stage and thus to order  
4 the Prosecution to open an investigation.

5 The Chamber is, however, undisputedly entitled to identify any errors of law and of  
6 fact committed by the Prosecutor in making her decision and require that they be  
7 addressed and corrected. As a matter of logic and commonsense, it follows that  
8 the Chamber can keep requiring the Prosecutor to address and correct such errors  
9 until they have been so addressed and corrected.

10 There will be no point in empowering the Chamber to review the Prosecutor's  
11 decision if she was just free to ignore such an outcome. Whatever wording she uses,  
12 that will be bound by the overall directions, but not the reasoning underlying those  
13 directions, whatever that means. Even if she expresses it in those terms or ever  
14 harsher terms, saying, "I'm just not going to follow the decision", it would amount to  
15 pure window dressing. If that was allowed, it would be a complete waste of time  
16 and above all, it would be demeaning of the Chamber.

17 The Comoros hence submits that the decision of the Pre-Trial Chamber of  
18 15 November 2018 should be upheld. The OTP having identified no discernible  
19 errors in their submissions, written or today, the OTP's application for a stay of that  
20 decision having been rejected by the Appeals Chamber, the OTP now has just over  
21 two weeks until 15 May to address and to correct the clear errors of law and fact that  
22 were identified by the Pre-Trial Chamber. A decision handed down nearly four  
23 years ago, and it is, the Comoros emphasises, most perplexing that the  
24 implementation of this decision should take so long. We don't need 500 pages; we  
25 don't need 10,000 documents looked at. We need the Prosecutor to address the

1 errors in good faith in accordance with her mandate.

2 This is the first time that the Appeals Chamber is being asked to address the scope  
3 specifically of Article 53(3)(a) directly, even though as my learned friend has  
4 indicated, the Appeals Chamber did have occasion previously to opine on the matter  
5 in dismissing the OTP's appeal *in limine*.

6 Now, the essence of that decision was to find that the review decision was not one  
7 with respect to admissibility. The Appeals Chamber did specifically state that it was  
8 taking no view on the merits of the grounds of appeal raised by the Prosecutor for  
9 determining that particular question.

10 The grounds of appeal themselves clearly did centre on the application and scope of  
11 Article 53(3)(a). However, your Honours, it is inevitable that there is some overlap  
12 between the merits and the procedure, given that the Appeals Chamber in its prior  
13 decision had to consider these provisions in order to interpret the meaning of with  
14 respect to admissibility.

15 In the submission of the Comoros, this gives rise to no difficulties for the Comoros in  
16 the submissions it has made so far. First, because the Pre-Trial Chamber has found  
17 that the decision accords entirely with the Appeals Chamber's prior decision, in that  
18 the Prosecutor is obliged to reconsider her position following a decision on review  
19 and to properly apply his or her mind in accordance with the Chamber's decision.

20 The Pre-Trial Chamber also rightly, your Honours may think, called out  
21 the Prosecutor on her belated reinterpretation of the failed appeal. The  
22 Appeals Chamber did not decide that there was no way the Pre-Trial Chamber's  
23 decision could be appealed and therefore that it must be left to the Prosecutor herself  
24 to deal with this matter as she wishes.

25 The Prosecutor, for whatever reason, decided not to seek leave to appeal and cannot

1 now pretend that that was done deliberately to show that there was no appeal  
2 jurisdiction in cases like this and therefore that she can fill in the gap acting as an  
3 Appeals Chamber, as the Pre-Trial Chamber below noted.  
4 And moreover, as the Pre-Trial Chamber rightly points out, the Prosecutor conceded  
5 in her misguided appeal application that she is bound to follow the  
6 Pre-Trial Chamber's review decision, but now it appears she has massaged that to say,  
7 "Yes, but I don't have to deal with the reasons underlying that decision." Now, the  
8 reasons underlying that decision. Now how one can possibly separate out the  
9 reasons from the errors itself is unfathomable. One of the errors that was identified  
10 is that the Prosecutor applied the wrong standard of proof. That what she should  
11 have done is accept that, if there are two alternative accounts before her on the  
12 evidence, that is not a basis to say, "I'm not going to go ahead." If the evidence might  
13 be confusing, there might be various accounts, as the Appeals Chamber has said in  
14 relation to Article 54 applications, that is not a basis to say, "Well, you can't go ahead  
15 now." The whole point of an investigation is to clarify those matters.  
16 Now how can you possibly apply your mind properly to that error and not look at the  
17 underlying reasoning? You have to consider the error in the round and decide  
18 whether or not it is an error that you are going to apply to the facts of the case before  
19 you and show how you have done that. As the Chamber below said, you need to  
20 identify the error and then show us in a detailed way how you have addressed it.  
21 What the Prosecution did, and I will look at this in the Group B questions, was exactly  
22 the opposite. They could barely bring themselves to mention the  
23 Pre-Trial Chamber's reasoning. They kept referring to us the Comoros and the  
24 victims, and that's how they dealt with the issues. And as I submitted then, they in  
25 fact didn't address the errors. They polished them up; they committed the same

1 errors again. Even more errors. They took the chance to actually double down on  
2 the errors, not address them in a direct and independent fashion.

3 The Pre-Trial Chamber has found that the OTP's decision of 29 November 2017 is not  
4 the final one in the sense that the matter is now closed merely because the Prosecution  
5 says so. Until the Prosecution has carried out her reconsideration on the basis of the  
6 Chamber's decision, the Pre-Trial Chamber retains the power to set aside the  
7 reconsideration decision in the event that the Prosecutor has refused to comply.

8 The Chamber's decision is the one that is clearly a judicial decision. The decision  
9 of the Prosecutor under Article 53 is not. She cannot render judicial decisions or  
10 quasi-judicial decisions either.

11 What she can do is exercise her powers to initiate an investigation pursuant to  
12 Article 53(1) once she has a referral, as in this case. But her decisions in that regard  
13 are first susceptible to judicial review; that's the first check that the States Parties put  
14 on it, which she must comply with. And then secondly, thereafter if an investigation  
15 is opened, the final decision on admissibility of the case will be that of the Chamber  
16 pursuant to Articles 17 and 19.

17 The Comoros submits that that scheme within the Statute is entirely consistent with  
18 the OTP being bound by the Chamber's decisions from the review stage during  
19 preliminary examinations, right through to the subsequent stages during an  
20 investigation and prosecution, should any challenges to admissibility arise or be  
21 brought forward *proprio motu* by the judges.

22 Your Honours, the question was posed about the difference in language between  
23 Articles 53(1)(b) and 17(1), "consider" versus "determine" we say is significant in that  
24 it highlights that at the very initial stage, the admissibility threshold should be, and is,  
25 very low.

1 The Prosecutor need not decide that the case is beyond doubt admissible. She must  
2 open an investigation unless there is no reasonable basis to proceed. There is  
3 a presumption of opening an investigation and I will deal with that in the next set of  
4 questions.

5 Thus, when she considers, not decides, whether the gravity threshold is met, she need  
6 only decide that she should proceed with an investigation given that there is no  
7 reasonable basis to believe the case is not serious enough. It's in fact a double  
8 negative and that decision is itself subject to judicial review by the referring State.

9 The Chamber may always intervene in the Prosecutor's exercise of her functions at the  
10 preliminary stage is the fundamental principle. And the Prosecution in fact  
11 conceded this in her second decision. She said the Pre-Trial Chamber is permitted to  
12 intervene if the Prosecution misinterpreted the law, breached a principle of natural  
13 justice or was unfair; if it took irrelevant information into account in reaching its  
14 decision or failed to take account of relevant information; or if it reached a factual  
15 conclusion, which was so unreasonable that no reasonable person with the same  
16 information could have made it. Those are the OTP's very words. And it's baffling,  
17 your Honours, that we're still here today with the OTP saying, "Well, we don't have to  
18 follow the underlying reason." Ultimately, they say we don't have to follow the  
19 directions, because that's the language they use in the question your Honours posed  
20 when they have conceded that the Pre-Trial Chamber can intervene in those specific  
21 limited circumstances to review the decision of the Prosecutor.

22 And this is exactly what the Pre-Trial Chambers below have done. They have found  
23 areas errors of law, found errors of fact and the Prosecution has agreed in terms that  
24 that comes within the Pre-Trial Chamber's remit.

25 The Comoros thus seized the Court with a request for a second review, the legal basis

1 being the terms of Article 53(3) and Rule 108, which the Pre-Trial Chamber correctly  
2 found must permit the Chamber to retain its supervisory role "until", underlined, the  
3 Prosecutor complies with the review decision. Especially in the present circumstances  
4 in which the Prosecutor said that she need not obey the reasoning of the Chamber.  
5 The entire purpose of the judicial review mechanism that was included by  
6 States Parties would be vanquished if the Prosecutor could unilaterally refuse to abide,  
7 in essence, by a review decision and thereby stop the referring State and the Chamber  
8 from taking any further action.

9 Even if the Prosecution had agreed she should comply in full, which she does not,  
10 further reviews must be permissible, the Comoros says, if the OTP commits the same  
11 mistakes again or new mistakes, as happens in most of our national jurisdictions. If  
12 the Prosecutor's decision is challenged and the Court says, "Yes, you've got to go back  
13 and look at the errors of law and fact" and she comes back with the same errors, you  
14 can review it again because the Court retains its power because the actions are still  
15 unlawful.

16 The Prosecutor cannot be a law unto herself and say, "Well, I've now made them  
17 lawful because I say so." The Court retains the power to determine that and no one  
18 else.

19 The Appeals Chamber asks about inherent powers. As I have stated, the express  
20 powers, in our submission, are there, as does the doctrine of effectiveness support the  
21 position of the Comoros.

22 But the Chamber could also rely on inherent powers in accordance with its own case  
23 law on the subject in order to, and this must be a prime area, ensure that its orders can  
24 be enforced. That is a procedural matter; not a substantive matter and entirely in  
25 accordance with the Appeals Chamber finding in the Bemba contempt decision.

1 The request with regard to: Are these proceedings akin to the provisions of  
2 Article 83(2)? The Comoros says, yes, they are, in that those proceedings,  
3 a Trial Chamber is required to reconsider the errors of fact that have been set by the  
4 court above and to act in accordance with them.

5 THE COURT OFFICER: [10:44:09] Five minutes left for the Comoros. Thank you.

6 MR DIXON: [10:44:12] So it is akin to that extent. Of course it is a different stage of  
7 the proceedings all together, but the underlying notion is exactly the same, that if  
8 you're told from above you need to address these errors, then that's exactly what  
9 happens. Those errors go back, the facts are looked at again, and those facts have to  
10 be considered in light of those errors. And until that's done, the Court below will  
11 not be left to its own devices. Or the institution below cannot say, "Well, we think  
12 we've done it."

13 No. It is only once the body that has referred the matter has decided it finally, that  
14 the body below is relinquished from having to comply with the order because the  
15 order has been complied with. So here too, the Prosecution must examine on the  
16 basis of the errors found, the facts and the law again. They cannot be left  
17 uncorrected.

18 Your Honours have asked rightly about sanctions. The Appeals Chamber below has  
19 found that the failure to follow the decision could result in sanctions being imposed.

20 The provisions clearly apply Article 70(1), in relation to persons present before the  
21 Court; Rule 17(1), refusal to comply with a direction of the Court and sets out what  
22 the procedure is; and also regulation 29, non-compliance with these regulations and  
23 with orders of the Chamber, giving the Chamber a wide discretion to take whatever  
24 action is necessary in the interests of justice.

25 In the submission of the Comoros, given how long this has gone on, how many



1 hurdles have had to be cleared, we are requesting that should the Prosecution still  
2 refuse, following this hearing and following the 15 May deadline to comply in full  
3 with the order to address the errors, not make any decision that any Chamber has  
4 said she must make -- no Chamber has done that, but address the errors, then  
5 sanctions should be considered. Otherwise, it will just repeat itself over and over  
6 again and the precedent will be set that in future, the Prosecutor can do exactly the  
7 same thing again.

8 So --

9 PRESIDING JUDGE BOSSA: [10:46:54] Counsel, sorry to interpret you.

10 MR DIXON: [10:46:56] That is my final point, sanctions must be considered.

11 PRESIDING JUDGE BOSSA: [10:46:59] One of us has a question.

12 MR DIXON: [10:46:58] Thank you, your Honour.

13 PRESIDING JUDGE BOSSA: [10:46:59] Judge Eboe-Osuji.

14 JUDGE EBOE-OSUJI: [10:47:02] I do. Yes, now having listened to you, Mr Dixon, I  
15 want to be sure that we are all on the same page in understanding the effective  
16 difference in the end; that in Article 53(3)(a) and Article 53(3)(b), if we may look at  
17 them.

18 MR DIXON: [10:47:25] Yes.

19 JUDGE EBOE-OSUJI: [10:47:26] 53(3)(a), "At the request of the State making  
20 a referral under article 14 or the Security Council under article" 17(b) -- sorry,  
21 "13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor  
22 under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider  
23 that decision."

24 The focus is on "may request" not "may order".

25 Proceeding now on to (b) says, "In addition, the Pre-Trial Chamber may, on its own

1 initiative, review a decision of the Prosecutor not to proceed if it is based solely on  
2 paragraph 1(c) or 2(c)."

3 Those are the provisions that deal with decisions solely on the interest of justice.

4 MR DIXON: [10:48:26] Yes.

5 JUDGE EBOE-OSUJI: [10:48:28] Okay. Continuing: "In such a case, the decision  
6 of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber."

7 What is then the effective difference between these two regimes, and where are we?

8 MR DIXON: [10:48:47] Yes, thank you, your Honour. The latter provision clearly  
9 empowers the Chamber with the ability to direct the Prosecution to a particular  
10 outcome.

11 JUDGE EBOE-OSUJI: [10:49:00] In other words, the final word?

12 MR DIXON: [10:49:03] In other words, sorry, your Honour?

13 JUDGE EBOE-OSUJI: [10:49:05] Giving the Pre-Trial Chamber then, in a manner of  
14 speaking, the final word, the final say?

15 MR DIXON: [10:49:11] Yes, in respect of cases concerning the interests of justice,  
16 that's a ruling that can then be made, quite categorically, because the Statute says only  
17 if committed by the Pre-Trial Chamber.

18 The provisions of 3(a) are markedly different, and here I don't disagree with my  
19 learned friends from the Office of the Prosecutor. They cover a completely different  
20 situation where we are looking at all of the other grounds under Article 53(1). And  
21 it may request the Prosecutor; so it is a discretion which the Chamber has. Whether  
22 that step will be taken, the Chambers in this case could have decided not to make  
23 such a request.

24 And the word "request" is used, the Prosecution has focused extensively on that, but  
25 in our submission there is no distinction between making a request and directing the

1 parties to do particular actions, in this case address errors of law and fact in --

2 THE COURT OFFICER: [10:50:19] We have reached 25 minutes for Comoros'  
3 submissions.

4 MR DIXON: [10:50:22] If I could just finish the point. Briefly, your Honours, if I  
5 may, States are requested all the time to arrest persons to comply, and if they don't  
6 comply, as the Articles and the Rules make clear, they can be held in non-compliance.

7 States have had to provide a cooperation, there have been many examples of arrests  
8 for persons where States haven't done so. And the order in that case is akin to it  
9 being a direction which, if the State does not address, there will be consequences.

10 And that's why I ended my submissions saying there should be consequences in this  
11 case as well. If there is non-compliance, then there must be sanctions, as applies  
12 equally to all member States. The Prosecution can't be in a different, unequal  
13 position.

14 Thank you, your Honour.

15 PRESIDING JUDGE BOSSA: [10:51:16] Thank you, Counsel. Your time is up --

16 MR DIXON: [10:51:21] Yes. Thank you, Madam President.

17 PRESIDING JUDGE BOSSA: [10:51:25] -- as I understand from the timekeeper.

18 We are now set to hear from the counsel for the Legal Representative of the Victims.

19 MR DIXON: [10:51:34] Thank you, your Honours. I have to continue with  
20 a different hat and with completely different instructions.

21 My submissions now on behalf of the 378 victims we represent, and they are based on  
22 their views that they have expressed to us about their personal interest during the  
23 course of this entire proceeding. Many of them are in fact here in the audience today,  
24 or following the proceedings around the world, including certain of the families of the  
25 10 persons who were shot and killed.

1 Many of them, as you know, your Honours, have given evidence before the UN  
2 proceedings already, as is reflected in the reports, and they have given evidence to the  
3 Comoros and to us as their representatives, which have been handed over to the  
4 Court.

5 Their submissions, for obvious reasons, are not going to go into the same technical  
6 details, but I do submit that it is important to hear from them what their perceptions  
7 are of the process, the questions that have been asked and where we have got in the  
8 limited time that is given to them.

9 Your Honours, their overarching concern, as has been expressed on a number of  
10 occasions, is that the Prosecutor in this case has acted more as a Defence counsel,  
11 picking holes in their case and trying to weaken it as though representing an accused  
12 at trial, than as a Prosecutor seeking to investigate genuinely their allegations.

13 And they say that this view is echoed very loudly in the most recent position that  
14 the Prosecution has taken of seeking to avoid compliance with the Chamber's rulings.  
15 They ask why wouldn't the Prosecutor, who is there to investigate our allegations and  
16 end impunity, want to address the errors that have been outlined that in their view  
17 appear to identify very relevant and pertinent issues about their cases and the  
18 suffering they endured.

19 To avoid investigating this case, as continues today, the victims highlighted  
20 the Prosecutor has at every turn and in every possible way sought to diminish the  
21 gravity of their case, without actually ever having investigated it. She has adopted  
22 positions on the law and on facts entirely consistent with those who might wish to  
23 defend the alleged perpetrators. She has prejudged issues, they say, and reached  
24 premature conclusions without actually conducting any investigation, that would  
25 naturally allow her to make determinations on an informed and independent basis.

1 They say these fundamental errors cannot be left to stand in this case, or in any case.  
2 Your Honours might think that it is quite an extraordinary collection of findings that  
3 you made. Just to run through a few quickly.  
4 First, without any investigation the Prosecution has found that the vessel was  
5 attacked, not the passengers. So that artificial separation allows her then to say, well,  
6 there were no crimes committed of unlawfully attacking civilians, conveniently helps  
7 to lower the gravity of the case.  
8 Then also in relation to intentionally launching an attack with the knowledge that it  
9 would cause loss of life, no chance, the Prosecution says, of that getting off the ground  
10 either. And this is despite the UNHCR finding in its report that the IDF  
11 demonstrated levels of totally unnecessary and incredible violence, and the UN  
12 Palmer report as well that followed, holding that the IDF's actions were excessive and  
13 unreasonable. Now, on top of that --  
14 PRESIDING JUDGE BOSSA: [10:55:56] If you could just pause there for a moment, I  
15 heard you say, and I stand to be corrected, that the Prosecution has found that the  
16 vessel was attacked, and not the passengers. Does the Prosecutor deny that  
17 passengers were killed in this attack?  
18 MR DIXON: [10:56:21] No. She says there were 10 instances of unlawful killings  
19 which amounts to a war crime. But, there is another crime which the Court has  
20 jurisdiction over, in fact, another collection of crimes about unlawfully attacking  
21 civilians and also civilian objects. It's a question that we will come to later where she  
22 said as well, "I don't have to deal with that matter, I don't have to deal with attacks on  
23 civilians." If those crimes were included, logically it would increase the gravity. So  
24 it's quite a clever way of, before you even get on to gravity, that's the way it's  
25 structured, you knock out a number of crimes that there must be --

1 THE COURT OFFICER: [10:57:06] Five minutes left.

2 MR DIXON: [10:57:07] -- a reasonable basis to at least investigate, given that the ship  
3 was attacked with passengers on it.

4 I make these points to show the same applies to the appropriation of properties, she  
5 says that's not extensive. The same applies to torture, no one was tortured. We  
6 have evidence of people who were shot on the top deck, left to die. One or two  
7 managed to survive. Now if that's not torture, I don't know what is. But that gets  
8 knocked out as well. It all gets put into the category of outrageous upon personal  
9 dignity.

10 So categorising the conduct in a consistent way to diminish the responsibility, the  
11 numbers of victims are too small as well. And there are no aggravating factors at all,  
12 she says. And even though the victims testify that live ammunition was used from  
13 the helicopters during the attack and there is supporting forensic evidence for that,  
14 the Prosecution dismisses all of this as well. That's confusing. In essence, adopting,  
15 the victims say, the IDF position that this was just an unfortunate melee, totally  
16 unexpected, a bit of a botched operation once again, all helps to undermine the idea  
17 that maybe there was a plan, a level of coordination behind this that would increase  
18 the seriousness of the acts.

19 She goes on to undermine the victim accounts: It was too dark, there was lots of  
20 smoke, maybe they couldn't see anything. Oh, they were being shot at, so maybe  
21 they couldn't therefore see what was going on because they were trying to protect  
22 themselves.

23 I mean, imagine holding that against somebody who is giving evidence about what  
24 happened to them?

25 And she thus concludes as a result of piecing all of these things together that the

1 crimes could not have been committed as part of a systematic or a deliberate attack  
2 with a particular cruelty.

3 No one up the chain of command, she says, could be responsible. It is all the  
4 individual soldiers who were on the ships. And no one waiting in Ashdod, the  
5 Israeli officials awaiting the ship to be brought there with interrogation facilities  
6 ready. Well, that was all completely separate, the Prosecution says, completely  
7 separate from the soldiers who arrested and abused the passengers and unrelated of  
8 course, because that means there is no plan, no coordination, no command, no gravity,  
9 just a few unconnected individual soldiers and officials acting by chance.

10 Now, that's a massive prejudgment to make at this stage. That might be the outcome  
11 of an investigation, but in the Comoros' submission, as I have already said, and the  
12 submission of the victims, there is certainly a reasonable basis to believe that there  
13 was a concerted overarching plan, given the nature of this operation and what it fitted  
14 into, and that should be investigated. If there are other reasonable accounts, well,  
15 they can be clarified during the course of that investigation.

16 That's the applicable standard of proof that has been identified by the  
17 Pre-Trial Chambers and the Pre-Trial Chamber.

18 The same with the -- the same with impact, that there has been no impact on the  
19 population in Gaza by the humanitarian aid not arriving, no impact more broadly,  
20 and this all despite the very pronounced UN involvement and mediation between the  
21 State Parties over many years, Israel and Turkey in particular, that followed this  
22 attack.

23 Finally, she goes on even further to attack the credibility and the reliability of the  
24 victims. There are pages and pages and pages of her questioning whether or not  
25 they are in fact reliable, because they were under difficult circumstances. Maybe

1 they didn't know the difference between lethal and non-lethal weapons.

2 These kinds of questions come up over and over again, all to say you must treat the  
3 evidence with caution, and yet she turns to the Turkel Report appointed by the Israeli  
4 government and says that that is a document that can be relied upon.

5 THE COURT OFFICER: [11:01:30] You have reached 10 minutes.

6 MR DIXON: [11:01:33] And finally, as the victims emphasised right at the outset,  
7 the Prosecutor pushes the nuclear button and says, "Okay, now I'm in a corner. My  
8 response is I am not bound by any of this. I can decide that enough is enough, this  
9 has been going on too long, we have dedicated too much time to it, we're closing it  
10 down."

11 The victims therefore urge the Appeals Chamber to maintain the decision of  
12 the Chamber below. No reasonable Prosecutor would come to the combination of  
13 outlandish conclusions adopted in this case by the Prosecutor against the victims.

14 Thank you, your Honours.

15 PRESIDING JUDGE BOSSA: [11:02:12] Thank you, Counsel.

16 We will now adjourn for a 30-minute break and resume these proceedings at 11.30, at  
17 which time we will hear from counsel from the Office of Public Counsel for Victims.

18 MS MASSIDDA: [11:02:28] Madam President, if I may address the Chamber before  
19 the hearing is adjourned for a brief matter on the conduct of the proceedings?

20 (Appeals Chamber confers)

21 PRESIDING JUDGE BOSSA: [11:02:59] Yes, Counsel.

22 MS MASSIDDA: [11:03:00] Thank you very much, Madam President.

23 I will be next in addressing the Chamber with the timeslot of 10 minutes. Having  
24 regard to the submission of the Prosecution and the Comoros, I would like to request  
25 the Chamber to be authorised to speak instead of 10 minutes, 15 minutes. I will not



1 use the 10 minutes allocated to myself at the end of the hearing in case of addressing  
2 any issue that I would like to, and I will then keep 5 minutes only for that final  
3 submissions instead of 10, if this is amenable for the Chamber. Thank you.

4 PRESIDING JUDGE BOSSA: [11:03:50] Counsel, your request is allowed.

5 MS MASSIDDA: [11:03:53] I am much grateful, your Honour. Thank you very  
6 much.

7 PRESIDING JUDGE BOSSA: [11:03:55] The case is adjourned.

8 THE COURT USHER: [11:03:58] All rise.

9 (Recess taken at 11.04 a.m.)

10 (Upon resuming in open session at 11.37 a.m.)

11 THE COURT USHER: [11:37:31] All rise.

12 Please be seated.

13 PRESIDING JUDGE BOSSA: [11:38:02] Hearing is resumed.

14 We will now hear from counsel from the Office of Public Counsel for Victims. You  
15 have the floor and the time is 15 minutes.

16 MS MASSIDDA: [11:38:14] Thank you very much, Madam President. Much  
17 obliged.

18 Madam President, your Honours, I will proceed in answering each question, at least I  
19 will attempt to in 15 minutes, for the entire Group A.

20 As far as the first group of questions in relation to the applicable law and judicial  
21 power is concerned, for question A we submit that the issue at stake in this appeal are  
22 distinct from the ruling on the admissibility on the Prosecutor's appeal rendered by  
23 the Appeals Chamber in 2015.

24 In the 2015 decision, the Appeals Chamber correctly found that the Prosecutor's direct  
25 appeal under Article 82(1)(a) of the Statute was inadmissible because the

1 Pre-Trial Chamber's decision could not be qualified as a ruling on jurisdiction or  
2 admissibility. Moreover, the Appeals Chamber did not adjudicate the issues at stake  
3 in this appeal.

4 In the present proceedings, granting leave to appeal pursuant to Article 82(1)(d)  
5 of the Statute, therefore, in the words of the Appeals Chamber, does not have the  
6 effect, and I quote, to "rupture the scheme for judicial review of decisions  
7 of the Prosecutor as explicitly set out in Article 53, [by] introducing an additional  
8 layer of review by the Appeals Chamber that lacks any statutory basis." End of  
9 quote. It is the appeal decision of 2015, paragraph 60.

10 In other words, the previous decision will have no effect, in our submission, on the  
11 present and current proceeding, because the Appeals Chamber seized on the merits  
12 can consider the issues at stake in their entire scope.

13 For question B, on the general principle of law that judicial decisions of the Court  
14 shall be respected and complied with, it's our submission that the Prosecution's  
15 contention against the Pre-Trial Chamber's legal reasoning does amount to  
16 noncompliance with the Chamber's request for reconsideration.

17 In our submission, the Prosecutor is bound to respect the interpretation of the law  
18 provided by the Chamber in its decision on the request for reconsideration.

19 In other words, the Prosecutor is not at liberty of not following the Chamber's  
20 guidance insofar as it provides the correct legal standards to the facts relied upon by  
21 the Prosecutor in the decision not to investigate.

22 We concur to some extent with the arguments made by the Comoros in relation to the  
23 need to readdress the errors identified by the Pre-Trial Chamber.

24 In this regard, the Appeals Chamber itself in the Lubanga case ruled, and I quote,  
25 "[n]o criminal court can operate on the basis that whenever it makes an order in

1 a particular area, it is for the Prosecutor to elect whether or not to implement it,  
2 depending on his interpretation of his obligations." End of quote. The reference,  
3 your Honour, is to document ICC-01/04-01/06-2582 OA 18, 8 October 2010,  
4 paragraph 48.

5 In turn, the judges had the power to ensure that their decisions are respected by  
6 issuing new order eventually or declaring null and void the contravening actions by  
7 the failing participant.

8 Going to the second prong of question B, the Prosecution, in our submission, does not  
9 have discretion to disregard the direction of a Pre-Trial Chamber on how to conduct  
10 its reconsideration, including the necessity of avoiding any undue delay in reaching  
11 a final decision.

12 Now, we go then to question C, what is reasonable compliance by a party or  
13 participant and what is, in our submission, the necessary consequence of  
14 a Prosecution failure to abide by the Chamber's ruling.

15 We argue in our written submission already, I will not repeat that, that the nullity of  
16 a final decision is possible consequence of a failure to abide.

17 By the way, in the jurisprudence of the ICC there are cases in which Chambers have  
18 sanctioned the Prosecution for failing to comply with his or her obligation. For  
19 brevity and considering the time, I omit the quotes, and I simply refer the Chamber in  
20 a decision in the Katanga case, ICC-01/04-01/07-621, 20 June 2008, paragraph 63.

21 And in a subsequent decision -- sorry, and in a subsequent decision in the Lubanga  
22 case in which the Appeals Chamber, even when considering that the Prosecutor's  
23 refusal to comply could be sanctioned under Article 71 of the Statute, also recalled by  
24 the Comoros, and the relevant decision is ICC-01/04-01/06-2582 OA 18, 8 October 2010,  
25 paragraph 48.

1 Moreover, your Honour, pursuant to Rule 117(1) of the Rules of Procedure and  
2 Evidence, which has also been recalled by the Comoros - and I am recalling it for  
3 a different purpose, I have a different conclusion - it is possible, as you know, under  
4 Rule 171 to sanction somehow the behaviour of a failing party or participant. Now,  
5 should the Appeals Chamber find that the Prosecution indeed failed to comply with  
6 the order of the Pre-Trial Chamber, it may, in our submission, issue a warning in the  
7 judgment of sanctions in the event of further breach.

8 Turning to question D, we agree with the Comoros submission in relation to the legal  
9 basis for the further review of the Pre-Trial Chamber. The legal basis also, in our  
10 view, remains Article 53(3)(a) of the Statute.

11 The second reconsideration does not distinguish itself, in our submission, from the  
12 one ordered in the first review under Article 53(3)(a) of the Statute.

13 And this provision must also be read in conjunction with Regulation 29(2) of the  
14 Regulations of the Court, according to which, where the Prosecution fails to comply  
15 with the judicial order, the relevant Chamber may issue a new order requesting  
16 the Prosecution to comply.

17 In the present instance, of course, the relevant order is the order for the Prosecution to  
18 proceed to a fresh review following the parameters set out judicially.

19 Turning to question E, we consider that the Pre-Trial Chamber power under 53(3)(a)  
20 can be considered akin to the power of the Appeals Chamber under Article 83(2)  
21 of the Statute, in the sense that the judicial reviewer may disturb the exercise of the  
22 decision-maker's discretion where a procedural error was committed or not remedied,  
23 as it is the case, in our submission, in the present instance.

24 THE COURT OFFICER: [11:48:07] Five minutes left.

25 MS MASSIDDA: [11:48:09] Question F, in relation to the inherent powers, we think,

1 your Honour, that it is not necessary in the present instance to resort to the inherent  
2 power of a Pre-Trial Chamber because the power to issue a ruling pursuant to Article  
3 53(3)(a) reviewing the Prosecution decision not to investigate encompasses also the  
4 power of a Pre-Trial Chamber to ensure that its ruling is correctly implemented.  
5 Question G - and we disagree strongly with the submission put forward this morning  
6 by the Prosecution - in our submission, the Chamber is empowered to make a final  
7 ruling on jurisdiction and admissibility, the Chamber and only the Chamber.  
8 Even if the Prosecutor has taken a determination that a potential case would be  
9 inadmissible, as it is the case in this instance, the judges are the ultimate guarantors to  
10 ensure that the most serious crimes do not go unpunished and as a necessary  
11 precondition to it, that crimes are investigated where the statutory requirements are  
12 met.

13 The same consideration, your Honours, goes, in our submission, also to question H,  
14 *mutatis mutandis*. In fact, in our submission, the word "consider" in Article 17  
15 of the Statute implies that the Prosecutor have to assess the relevant factors on the  
16 said provision to make an evaluation on the admissibility of a case, while the word  
17 "determine" used in the same provision as referred to the Court indicates that  
18 the Chamber has instead the duty to evaluate, determine if the case is admissible.  
19 The difference in words relates, in our submission, to the different functions and  
20 powers of the Prosecutor and the Chamber. The Chamber keeps its function of  
21 being the guardian of a process and of the parties' and participants' compliance with  
22 the law.

23 In relation to question I and J, we submit, your Honour, that instead of reasoning in  
24 terms of the nature of the decision as administrative or judicial, it may be worth  
25 considering that a Prosecution decision pursuant to Rule 108 of the Rules is

1 discretionary in nature, and as such, subject to judicial scrutiny in relation to the  
2 correctness of the law applied and its consistency with the legal text and relevant  
3 jurisprudence.

4 It is true that it is the prerogative of the Prosecutor to reach the final decision on  
5 whether or not to commence an investigation. However, this does not mean per se  
6 that decisions she takes and she considers "final" are immune from review for  
7 procedural correctness by their characterisation alone.

8 And the concept of discretionary decisions, in our submission, necessarily implies  
9 that they are per se subject to mechanisms of oversight.

10 Consequently, a decision considered "final" by the Prosecutor in the sense of the text  
11 of Rule 108(3) cannot be regarded, and I am happy to note that we agree with  
12 the Prosecution, as *res judicata* because this concept relates to a final judgment on the  
13 merits by a court having jurisdiction in the matter. It is a ruling which is conclusive  
14 between the parties to a suit as to all matters that were litigated or that could have  
15 been litigated in that suit.

16 With my apologies to the interpreters, I was speaking very fast.

17 Thank you very much, your Honours.

18 PRESIDING JUDGE BOSSA: [11:53:12] It's all right. Is the time up?

19 Thank you, Counsel.

20 Now the Office of the Prosecutor may briefly respond, if they wish, in five minutes.

21 MR CROSS: [11:53:30] Thank you, your Honours.

22 I will try and cover some six points very briefly in response to what has been a rich  
23 discussion between the parties and the participants.

24 One of the key issues which seems to be coming out of our discussion this morning is  
25 a fundamental disagreement about the nature of Article 53(1) itself. It is the view of

1 the Prosecution, consistent with her constant practice in all preliminary examinations  
2 that she has undertaken, as well as the constant practice of the Pre-Trial Chamber in  
3 all of its decisions under Articles 15(4), that the Prosecutor must make positive  
4 findings about the conditions set out in 53(1)(a) and 53(1)(b). And obviously our  
5 duty, as we see it, to make those positive findings means that on occasion where we  
6 find something which may put that into doubt, we must go into that matter in order  
7 to satisfy ourselves.

8 Now, we appreciate there may be diverging views amongst different reasonable  
9 interpreters of the Statute, but we would urge your Honours that it is the Statute itself  
10 which will be interpreted by your Honours in this appeal which must govern,  
11 ultimately, what our obligations as Prosecutors are, and we shall follow that  
12 guidance.

13 I must also confess I am still no clearer, despite the very learned and helpful  
14 submissions by my friends opposite, as to precisely how the Comoros distinguishes  
15 between an obligation upon the Prosecutor to accept the reasoning of the  
16 Pre-Trial Chamber, in other words, to accept the errors that it has identified, but in  
17 some way that the Prosecutor still has some residual discretion not to make the  
18 ultimate finding of sufficient gravity or the ultimate finding of admissibility, or  
19 indeed, perhaps if 53(1)(c) isn't an issue and if complementarity isn't an issue, to make  
20 the ultimate finding to open an investigation. As we see it, if you take some steps  
21 down the road, then effectively we must follow where those steps lead.

22 PRESIDING JUDGE BOSSA: [11:55:47] Can you slow down a bit for the benefit of  
23 the interpreters, please.

24 MR CROSS: [11:55:54] I am obliged, your Honour. Thank you.

25 Similarly --

1 JUDGE EBOE-OSUJI: [11:55:56] Isn't that a distinction between a question of law  
2 and a question of fact, you may have a discretion or leeway to go somewhere on the  
3 question of fact, then that somehow must come within the envelope of the law which  
4 may be somebody else's to have the final say on? Is that one way of looking at it?

5 MR CROSS: [11:56:19] Your Honour, yes, that is one way of looking at it. And of  
6 course, in particular, we are always going to be mindful of what the  
7 Pre-Trial Chamber says in a decision, we will be most particularly and scrupulously  
8 mindful about what the Pre-Trial Chamber says in a 53(3)(a) request on matters of law,  
9 but we would just point your Honour to the passage in our appeal brief in the  
10 drafting history discussion, where we note that the drafters considered whether or  
11 not to make a difference between rulings by the Pre-Trial Chamber on questions of  
12 law under 53(3)(a) and questions of fact. And they decided not to make any  
13 distinction, they just left it in the terms that we have referred to, which is about  
14 requesting the Prosecutor to reconsider.

15 JUDGE EBOE-OSUJI: [11:57:00] Which then leaves it to a matter of jurisprudence to  
16 clarify that, doesn't it?

17 MR CROSS: [11:57:04] Yes, indeed, your Honour, which is one of the reasons why  
18 we are here today.

19 In terms of your question also to Mr Dixon concerning the distinction between 53(3)(a)  
20 and 53(3)(b), we just very briefly note that Mr Dixon didn't address Rule 110(2), and  
21 our position in this regard isn't just a question of the word "request" in 53(3)(a),  
22 although of course that's very suggestive, but also other contextual reasons, including  
23 Rule 110(2).

24 Moving on very briefly, as I am aware time is short, it follows from our view of the  
25 comprehensive nature of Article 53 that, in our view, there can be no lacuna in



1 the Statute, and therefore, somewhat similar perhaps to Ms Massidda, we would say  
2 that the question of inherent powers doesn't arise in this context.

3 On factual matters, and I am now down to my last two points, your Honours, I just  
4 very gently and respectfully invite your Honours to consider some of the factual  
5 observations made by Mr Dixon, particularly concerning the scope of the identified  
6 crimes that the Prosecutor found in the preliminary examination and to take that with  
7 a little bit of caution. I'm sure it was a slip of the tongue, but we made a finding not  
8 only that there was a reasonable basis to believe willful killings were committed, but  
9 also there is a reasonable basis to believe outrages upon personal dignity were  
10 committed, both of which Mr Dixon mentioned, but thirdly, that there is a reasonable  
11 basis to believe some 50 passengers were seriously wounded. And we just want to  
12 put that on the record so that it is clear, we are not and have not omitted any of the  
13 key factual circumstances which make up this situation.

14 Finally, your Honours, on the comparison of our approach to this preliminary  
15 examination with Defence counsel, I have to say it is the first time I have ever been  
16 compared to Defence counsel in my approach --

17 JUDGE EBOE-OSUJI: [11:59:05] That is not a bad thing (Overlapping speakers).

18 MR CROSS: [11:59:07] It's not at all. I'm very grateful for the comparison. But  
19 what I would say, and this is --

20 THE COURT OFFICER: [11:59:12] You have reached five minutes.

21 MR CROSS: [11:59:13] -- my final sentence, the Prosecution in this situation and all  
22 situations acts objectively and impartially as the Statute requires. And, therefore, it  
23 is very much our position and our sincere effort that we do not treat this situation  
24 differently from any other. And that means we are neutral in our language, we are  
25 neutral in our approach, and we try and follow what the Statute tells us we must do.

1 And on that basis, your Honours, I shall conclude my submissions. Thank you.

2 PRESIDING JUDGE BOSSA: [11:59:44] Thank you, Counsel.

3 We will now hear from the Government of the Union of the Comoros.

4 Counsel, you have the floor.

5 MR DIXON: [11:59:53] (Microphone not activated)

6 THE COURT OFFICER: [12:00:04] Your microphone, please. Thank you.

7 MR DIXON: [12:00:07] I apologise. The Prosecution still has not clarified two key  
8 issues. The first is, are they bound by errors of law that are pointed out by the  
9 Pre-Trial Chamber when they judicially review the decision of the Prosecutor not to  
10 open an investigation?

11 An example we have used before: If the Prosecutor said "I am not going to  
12 investigate this case because crimes against humanity require, in our view,  
13 a connection with armed conflict", and that is then reviewed, and the judges say, "Yes,  
14 in this case, there might be no evidence of armed conflict, but you are wrong as a  
15 matter of law because crimes against humanity don't require that connection", are  
16 they then bound to follow that thereafter in their review?

17 Or can they say, "Well, look, we are in a phase here where we have got independence  
18 and discretion and what we say anyway is not going to be binding later", that's what  
19 my learned friend has said, "so why in this case can't we just do that because later on  
20 you can clarify it"? I mean, that would lead to a completely upside down situation  
21 where they would be adopting different positions which are not binding to positions  
22 in cases that might be going to trial.

23 And likewise, following on from that, the second question that they haven't answered  
24 is: If they are bound, which they must be, by the reasoning that leads to a legal error,  
25 why are they not bound by the reasoning that leads to an error of fact, which they

1 have said there is no difference between such errors? Of course the way in which  
2 they are defined that apply is different, but in principle there is no underlying  
3 difference. So they haven't answered that question either.

4 And my learned friend asked the question: Well, if you have to take the errors into  
5 account, how is it possible that you could still come to a different conclusion?

6 Well, it happens all the time in judicial review proceedings where judges will outline  
7 that certain facts that are relevant have been overlooked, prominence hasn't been  
8 given to key evidence, please go back and have a look at that, genuinely. And those  
9 below take it that they have got to show that they accept the error, which hasn't  
10 happened in this case, examine it in detail and explain why, taking that into  
11 account -- they might well change their mind, but the Prosecution has to be open to  
12 changing its mind on this.

13 But at the end of the day, if through the reasoning process they have genuinely  
14 looked at that evidence and, taking other evidence into account, it doesn't change the  
15 outcome, then they say that. And that often happens. And sometimes there may  
16 be a second JR because there's still an error, and of course you have to have a limit to  
17 it. And there are ways of doing that, you can't have frivolous claims. But this case  
18 certainly isn't one where any notion of wasting the Court's time, in my submission,  
19 has arisen because the Prosecution simply hasn't addressed any of the errors.

20 So you can certainly come to a different conclusion to the one those who were arguing  
21 the JR might be contending. You must be open to also look at taking that evidence  
22 actually into account and seeing whether it will change your mind.

23 The submission that was made earlier on was saying there seems to be an  
24 overwhelming stubbornness not to do that. And yes, the Prosecution says that it has  
25 to act impartially and not look at treating situations differently, but one of the

1 submissions that we have made and will continue to make is that they are treating  
2 this situation differently to cases like the Abu Garda case and other situations. They  
3 are not applying the law equally. They are making differentials which don't make  
4 any sense, which are irrational, and that's where, fortunately, the States Parties have  
5 inserted the judicial review mechanism so when you have a referral and it doesn't go  
6 through the Pre-Trial Chamber, it bypasses, the Pre-Trial Chamber has a supervisory  
7 role to play, and that role continues until those errors are addressed. It is not meant  
8 to be draconian, it's not meant to cut the Prosecutor down at her knees, it's meant to  
9 make the system work. Those checks and balances are vital to ensuring the healthy  
10 operation of the ICC, and that's why we say it is so important that in this case you  
11 don't just stop at having one judicial review and it's over, because it's too easy to  
12 dodge that and sidestep it. And you can use, as I have been saying, fancy language  
13 to try and ultimately say the same thing, which is that we are not going to do what  
14 you told us to do. This Court has to come back and say, "Yes, you are and if you  
15 don't do that, there will be consequences."

16 Thank you, your Honours.

17 PRESIDING JUDGE BOSSA: [12:05:07] Thank you, Counsel.

18 We will now turn to Group B questions and we will start with the Office  
19 of the Prosecutor.

20 You have 30 minutes and you may begin now.

21 MR STEWART: [12:06:56] Madam President, your Honours, I am going to address  
22 the issues identified in Group B of the order, and these issues are grouped around the  
23 issue of the Prosecutor's implementation of the request for reconsideration. And  
24 given that heading, I should begin by observing, before I come to the issues  
25 themselves, that these issues may be focusing on the merits of the Prosecutor's

1 reconsideration itself, and in our submission would thus not be intrinsically linked to  
2 the scope of the present appeal, which as certified by the Pre-Trial Chamber, raises  
3 two questions of statutory interpretation. And these questions of course have been  
4 addressed by Mr Cross in his submissions.

5 However, while the outcome of this appeal by the Prosecutor may not turn on the  
6 answers to the questions raised in Group B, it may be helpful to place the issues of  
7 statutory interpretation with which the Appeals Chamber does have to deal in context,  
8 and I am happy therefore to address these issues in Group B.

9 And of course we recognise that it is relevant for this Chamber to consider whether  
10 a request made pursuant to Article 53(3)(a) of the Statute to reconsider a decision not  
11 to initiate an investigation because of insufficient gravity does impose upon  
12 the Prosecutor an obligation to reach a particular result as well as imposing upon her  
13 the obligation to engage in a particular process.

14 How the Prosecutor approached specific questions of law or fact in reaching her final  
15 decision in this case, however, does not answer the purely legal question about the  
16 nature of the obligation she was under when the Pre-Trial Chamber requested her to  
17 reconsider her original decision.

18 Nor does it answer the purely legal question of what, if any, powers the  
19 Pre-Trial Chamber could exercise once the Prosecutor notified her final decision.

20 But let me come to this context, let me come to the questions in Group B, and I will  
21 start with question A.

22 We submit that the Prosecutor's final decision does effectively address the five  
23 concerns identified by the Pre-Trial Chamber in its original request to reconsider.

24 The key references are given in our appeal brief in the passages cited at B1 of our  
25 reference list.

1 I am not going to go into details, but will touch very briefly on the five concerns and  
2 how the Prosecutor addressed them.

3 In sum, concerning the likely objects of any investigation, we attempted to explain an  
4 apparent misunderstanding that had arisen concerning the scale of the identified  
5 crimes. We explained how this situation is distinguishable from the Abu Garda case  
6 on qualitative considerations, and I will come back to that in answering a later  
7 question that has been put to us.

8 Concerning the nature of the crimes, we explained why we treat the undisputed  
9 factual nature of the material conduct as key to the gravity assessment, not  
10 a particular legal label.

11 Concerning manner of commission, we explained why, on the facts, we were unable  
12 to find a reasonable basis to believe the identified crimes were committed according  
13 to a plan or policy. And finally, concerning impact, we explained among other  
14 matters our view of what in the circumstances constituted a reasonable interpretation  
15 of the available information.

16 So while it's true, for the reasons set out in the Prosecutor's final decision, we did not  
17 come to the same position as the Pre-Trial Chamber did in its own analysis, this is far  
18 from saying we did not give the Pre-Trial Chamber's reasoning due consideration.

19 To the contrary, we explained clearly why we arrived at different conclusions.

20 When necessary, such as in relation to the factual question bearing on the alleged  
21 timing of the use of live fire, this meant entering into detail to explain the conclusion  
22 we reached.

23 On this point, it's important to remember the Pre-Trial Chamber never itself reviewed  
24 any of the available information underlying our analysis.

25 On other questions we were able to explain our conclusions more concisely. In each

1 case, our engagement was more than merely formal, but reflected instead  
2 the Prosecutor's desire to be clear in good faith about the basis for her final decision.  
3 All that said, however, if we are correct in our interpretation of the statutory regime  
4 engaged here, and have properly understood the analysis of that regime made by the  
5 previous Bench of the Appeals Chamber, then the Prosecutor was free to depart from  
6 the reasoning of the Pre-Trial Chamber, provided she complied with the requirements  
7 of Rule 108(3) respecting her final decision.  
8 Thus, the Prosecutor's final decision had to be a reasoned one, as Rule 108(3) requires.  
9 The reasons also had to be adequate, including for the policy reasons mentioned in  
10 our appeal brief and cited at B2 of our reference list; namely, engaging in a reasoned  
11 analysis contributes to better decision-making and it shows respect for other  
12 stakeholders. These formal requirements, we submit, should define the limits of the  
13 consideration of this issue by the Appeals Chamber.  
14 Let me come now to questions B and C. These relate to the Haskanita incident in  
15 Sudan, which was considered to be sufficiently grave in cases such as Abu Garda.  
16 In the Prosecutor's initial Article 53(1) report, she explained why, in her view, the  
17 facts of the Mavi Mamara situation should be distinguished from those in Abu Garda.  
18 Her reasoning was criticised by the majority of the Pre-Trial Chamber in its first  
19 request to reconsider and was addressed briefly again in the Prosecutor's final  
20 decision. And I would refer the Chamber to the references at B3 of our reference list.  
21 I will deal first with the matter of the standard applied and then with the matter of  
22 the importance of the fact that peacekeepers were the target in the Abu Garda case.  
23 So first, in relation to question B.  
24 The Prosecutor did not apply a differential standard which treated the Abu Garda  
25 victims better than the victims of the Mavi Mamara situation. As a general rule, like

1 cases should be treated alike. The use of a differential standard implies that like  
2 cases might improperly not be treated alike. Clearly, this is to be avoided.  
3 Here, the Prosecutor specifically made a careful analysis to determine whether the  
4 facts of the Mavi Mamara situation were analogous to those involved at Haskanita.  
5 This was done to determine whether these situations had to be treated alike.  
6 However, on the basis of the analysis, we found that the situations were not  
7 analogous and the cases were not alike. No one, not the Pre-Trial Chamber or any  
8 party or participant, has yet shown an error in our reasoning in this respect.  
9 Consequently, we would not characterise our approach as applying a differential  
10 standard in any improper way.  
11 With respect to question C, and I say out of respect for the victims in this situation, I  
12 should emphasise that it is not out of any lack of sympathy for the victims of crime to  
13 observe on a reasoned and principled basis that the characteristics of their  
14 victimisation may differ from the victimisation of others. This is not to deny the  
15 individual suffering of any person. Nevertheless, the framers of the Rome Statute,  
16 by virtue of the provisions found in Articles 17(1)(d) and 53(1)(b) made clear that this  
17 Court does not have a universal mandate, but a necessarily selective one.  
18 Part of that selectivity is vested in the threshold assessment of sufficient gravity  
19 required by those provisions of the Statute. We cannot get around that. This Court  
20 cannot be everything to everyone. It is simply not designed that way.  
21 As Prosecutors we have a duty to be faithful to the legal requirement of sufficient  
22 gravity as do all others.  
23 So why did the Prosecutor consider that the facts of the Mavi Mamara situation could  
24 be properly distinguished from the facts of the incident at Haskanita?  
25 The Haskanita situation involved an attack upon peacekeepers; peacekeepers occupy



1 a special place in international humanitarian law. They are afforded express  
2 protection, along with humanitarian assistance workers, in the provisions of  
3 Article 8 of the Rome Statute pertaining to war crimes.

4 In its case selection and prioritisation policy, the Office of the Prosecutor has said it  
5 will pay particular attention to attacks against humanitarian and peacekeeping  
6 personnel, among others, in order to highlight the gravity of such crimes and help to  
7 end impunity and contribute to their prevention. And I would ask you to have  
8 reference to our references at B4.

9 In the Abu Garda case, disrupting the activities of peacekeepers by attacking them led  
10 to direct and immediate adverse consequences for the broader civilian population  
11 whose security they were meant to ensure.

12 Being mindful that like cases should be treated alike, the Prosecutor considered  
13 carefully whether the passengers on the Mavi Mamara might fall within the definition  
14 of humanitarian assistance workers within the meaning of Article 8(2)(b)(iii) or (e)(iii)  
15 of the Rome Statute. And I would refer you to B5 of our list.

16 In the end, the Prosecutor found that the passengers could not be considered as  
17 humanitarian assistance workers within the legal definition. And consequently,  
18 disruption of their activities by the identified crimes could not be said to have the  
19 same impact as one saw in Abu Garda.

20 The Prosecutor's analysis did not stop there. Quite apart from the legal  
21 characterisation of the passengers, she also took into account what happened to the  
22 cargo of the flotilla, which contained supplies intended for the people of Gaza. This  
23 cargo was duly delivered in Gaza after inspection by the Israeli authorities in  
24 accordance with the law applicable to blockades. And I would refer you to our  
25 reference at B6.

1 Finally, we note the Pre-Trial Chamber's concern about the symbolic effect of the  
2 occurrence of the identified crimes on the Mavi Mamara. However, we are mindful  
3 of the Appeals Chamber's warning against use of the concept of "social alarm", that is,  
4 negative reaction or a condemnation in the international community, as a measure of  
5 gravity.

6 The Appeals Chamber has cautioned against using such a subjective criterion in  
7 conducting the gravity analysis. On the gravity assessment, relating to the decision  
8 whether to initiate an investigation, is a matter that requires an objective approach. I  
9 would ask you, please, to see the reference at B7.

10 For all these reasons we submit there is no contradiction between the approach we  
11 took in the Abu Garda case and the one we took in this situation. Nor is there any  
12 inconsistency with internationally recognised human rights in our interpretation of  
13 the relevant provisions of the Statute.

14 Madam President, your Honours, I come now to questions D and E, on a different  
15 topic.

16 We submit that the position taken by the Prosecutor in the situation relating to the  
17 Mavi Mamara is consistent with the position that she took in the litigation concerning  
18 the Rohingya, what we style the Myanmar/Bangladesh situation.

19 The two situations are completely different.

20 A possible concern here, however, we understand may relate to the technicalities of  
21 our legal position in Myanmar/Bangladesh, rather than the facts, which are obviously  
22 vastly different, including in the scale and scope of the alleged crimes.

23 Respecting the Myanmar/Bangladesh situation, as your Honours know,  
24 the Prosecutor sought the assistance of the Pre-Trial Chamber to confirm the Court's  
25 jurisdiction. She did so in the context of allegations that persons had been deported

1 from the territory of a non-State Party into the territory of a State Party. We took the  
2 position that if a legal element of a crime occurs on the territory of a State Party, this  
3 suffices to establish the Court's jurisdiction under Article 12(2)(a). I would refer you  
4 to B8 of our list.

5 This was the case with the alleged crime against humanity of deportation in the  
6 Myanmar/Bangladesh situation. The crime of deportation was allegedly completed  
7 when the Rohingya were driven from Myanmar, a non-State Party, across the border  
8 into Bangladesh, a State Party to the Rome Statute.

9 Contrast that situation with the one with which we are dealing here. Here, the  
10 alleged crimes identified by the Prosecutor were completed entirely on the  
11 Mavi Mamara, which is the territory of the Comoros, a State Party to the Rome Statute.  
12 In this way, we see the Mavi Mamara situation and the alleged deportation from  
13 Myanmar into Bangladesh as being very different.

14 We did note the further allegations concerning alleged mistreatment of passengers  
15 from the Mavi Mamara in the approximately 72-hour period they were subsequently  
16 present in Israel. We took no position on whether or not these allegations could  
17 amount to Article 8 crimes since we felt we had no jurisdiction over them.

18 However, even if they could, no legal element of these alleged crimes also occurred  
19 outside the territory of Israel, a non-State Party, on the territory of a State Party to the  
20 Rome Statute so as to create a material comparison with the alleged  
21 Myanmar/Bangladesh situation.

22 Furthermore, while the passengers were present on Israeli territory as a consequence  
23 of the boarding of the Mavi Mamara by the IDF, this factual connection is insufficient,  
24 in our submission, to establish the necessary jurisdictional link.

25 We appreciate that the Pre-Trial Chamber in its decision on the Court's jurisdiction

1 respecting the Myanmar/Bangladesh situation referred not only to the possibility of  
2 the Court's jurisdiction becoming engaged where a legal element of a crime occurs on  
3 the territory of a State Party, but also, alternatively, when part of a crime occurs there.  
4 This would, however, we submit, require an exceptional factual basis upon which to  
5 assert jurisdiction. We might be able to imagine exceptional factual circumstances  
6 that establish a jurisdictional link, for example, an unlawful cross-border attack on  
7 civilians located in a State Party where the resulting harm, while not comprising  
8 a legal element of the crime, is yet inextricably encompassed by the legal elements  
9 occurring outside the territory. And just to be clear, we are talking about a shelling,  
10 artillery fire from a non-State Party on to civilians in a State Party. That's so far what  
11 we have been able to imagine. But it is difficult, frankly, to imagine a factual link  
12 that would suffice.

13 And we don't see any exceptional circumstances in the Mavi Mamara situation  
14 sufficient to ground the Court's jurisdiction. And we have explained why we found  
15 that the perpetrators of the alleged misconduct on Israeli territory could not be  
16 rationally associated for the purposes of Article 53 with the perpetrators of the alleged  
17 crimes aboard the Mavi Mamara. And I would refer you to our references at B9.

18 To sum up, no legal element of the identified crimes occurred outside the  
19 Mavi Mamara and no legal element of the alleged misconduct occurring on the  
20 territory of Israel occurred outside the territory of Israel.

21 Nor did the factual circumstances pertaining to the events alleged to have occurred in  
22 Israel, exceptionally, create any reason to regard them as also occurring in part on the  
23 Mavi Mamara in the manner alluded to by the Myanmar/Bangladesh  
24 Pre-Trial Chamber.

25 Turning now to a related matter, the Prosecution does not consider there to be

1 a reasonable basis to believe that the identified crimes on the Mavi Mamara were  
2 continuing crimes.

3 JUDGE EBOE-OSUJI: [12:27:19] Mr Stewart, just for clarification, this is not  
4 a question, the factual scenario, distinctions you are drawing between the Myanmar  
5 scenario and this one, you're saying in the matter of the Mavi Mamara, the  
6 jurisdictional link worked this way: It started on the territory of Comoros, being the  
7 ship, and then moving on to Israeli territory. Whereas in the Myanmar scenario, the  
8 scenario was it started on the territory of Myanmar, a non-State Party, and then the  
9 effects flowed into State Party, Bangladesh; is that it?

10 MR STEWART: [12:28:10] Yes.

11 JUDGE EBOE-OSUJI: [12:28:11] And you are saying this is a difference?

12 MR STEWART: [12:28:14] Well, what your Honour has posited is what I would call  
13 the jurisdictional hook question. The jurisdictional hook that we saw, which pulled  
14 the criminality that occurred in Myanmar into the jurisdiction of the Court was the  
15 completion of the crime of deportation on the territory of a State Party.

16 Now, it doesn't mean that we have jurisdiction over the sexual violence, the pillaging,  
17 the burning, the killing that occurred in Myanmar which had the effect and was  
18 designed, we allege - or I suppose we will come to allege at some point - had the  
19 effect of driving over 600,000 refugees across the border from Rakhine State into  
20 Bangladesh, but the jurisdictional hook that you would have to find with the  
21 Mavi Mamara situation would be something happening -- the events in Israel would  
22 somehow have to be so inextricably connected to what happened on the territory of  
23 a State Party, ie, the ship, that that would provide the jurisdictional hook. It doesn't  
24 matter really which way it goes --

25 JUDGE EBOE-OSUJI: [12:29:28] Isn't that where the question of policy or plan

1 comes in?

2 MR STEWART: [12:29:32] Well, we examined the question of policy or plan, but  
3 frankly, we found the evidence, if you can call it that, the information so weak on that  
4 point that it was, in our view, unreasonable to find that there was a policy or plan in  
5 this case.

6 JUDGE EBOE-OSUJI: [12:29:50] I think Mr Dixon is saying how can you come to  
7 that conclusion without investigating it even?

8 MR STEWART: [12:29:56] Well, the problem, your Honour, is this: You can't just  
9 launch an investigation without taking into account the various factors that you have  
10 to consider under Article 53. And the Prosecution was obliged to look at such issues,  
11 and if we reasonably found that there wasn't a basis to say that this was the product  
12 of a policy or a plan, which potentially could render the activity more serious, then, in  
13 our submission, that was a call that we had to make and we had to make it  
14 responsibly, and we couldn't simply say, well, we don't know so we're going to do an  
15 investigation. That would be, in our submission, a dereliction of the duty that we  
16 have, as difficult as it is sometimes to carry it out under the Statute.

17 JUDGE EBOE-OSUJI: [12:30:43] But if something has happened on the ship, which  
18 you say amounted to killings and you say that taken on its own is something that  
19 should be provoke an enquiry - I'm not saying so - but assuming that is the case,  
20 doesn't that give you then a reason to say: Okay, was this planned or not? And  
21 then we want to know whether or not it was planned.

22 MR STEWART: [12:31:06] My response to that, I would say, your Honour, is simply  
23 that we have to take an holistic approach to these things. We can't look at individual  
24 factors as being determinative. We need to look at the whole picture.

25 Just with respect to the matter of continuing crimes, and I may in fact address some of

1 the concern that you have expressed, your Honour, in this part of our response, as we  
2 submitted in the Myanmar/Bangladesh, the notion of continuing crimes requires not  
3 only that harm to the victims continues, but that the perpetrators or perpetrator group  
4 retain control over that harm's continuation. And we would refer you to B-10.

5 And we find no reasonable basis here to consider that the alleged perpetrators of the  
6 identified crimes had any control over the treatment of the Mavi Mamara passengers  
7 once they had disembarked.

8 In our view, it's insufficient that the alleged perpetrators of the identified crimes may  
9 share the same national allegiance --

10 THE COURT OFFICER: [12:32:11] Five minutes left.

11 MR STEWART: [12:32:12] -- or serve the same government as the persons  
12 responsible for the subsequent treatment in Israel of the Mavi Mamara passengers.

13 We would refer you to B11.

14 So we submit that the situation encountered in Myanmar/Bangladesh is really  
15 nothing like that encountered in the Mavi Mamara situation, and our approach  
16 reveals no inconsistency.

17 I think I am coming to the final question, which is F. And this has to do with  
18 whether or not the Prosecutor was correct in the way in which she approached the  
19 legality of the interception of the Mavi Mamara by the IDF, irrespective of the  
20 identified crimes. And this of course has to do with the controversy over the legality  
21 of the Israeli blockade of Gaza, an issue we felt we did not have to take a firm position  
22 on, especially at the preliminary examination stage, since it ultimately had no bearing  
23 on our assessment of the gravity of the case alleged. And I would refer you to B12 in  
24 our list.

25 Now, it's true that the fact-finding mission of the UN Human Rights Council did form

1 the view about the legality of the blockade. And I would refer you to reference B13.  
2 However, it is fundamental to the structure of Article 53(1), read together with Article  
3 42, that the Prosecutor is legally required to make an independent determination of  
4 the facts and their legal characterisation in a situation for the purpose of carrying out  
5 her preliminary examination. Accordingly, while she will of course refer to the  
6 views of other relevant bodies and institutions, she is not bound by them. And in  
7 this case she found that a conditional determination was the appropriate approach  
8 to take.

9 Moreover, she was aware that the UN Human Rights Council's mission was not the  
10 only body which expressed itself on the matter and the various views doesn't  
11 coincide.

12 For example, the UN Palmer-Uribe panel, which was also mandated to enquire into  
13 the incident on behalf of the UN Secretary-General, did not simply adopt the  
14 UN Human Rights Council's conclusion, but found instead that Israel's blockade was  
15 legal, disagreeing that the blockade must be seen as part of Israel's land restrictions  
16 policy affecting the Gaza Strip. And I would refer you to B14 on our list.

17 Madam President, your Honours, we note too that this particular issue is not one  
18 which has been raised by the parties or participants or the Pre-Trial Chamber at any  
19 point to date, it doesn't form part of these appeal proceedings, since not even the  
20 majority of the Pre-Trial Chamber faulted the Prosecutor's Article 53(1) report in this  
21 respect, and nor did this question form part of the Prosecutor's reconsideration  
22 leading to her final decision.

23 But I have explained her approach on the matter.

24 And with that, I conclude our submissions on Group B. Thank you.

25 PRESIDING JUDGE BOSSA: [12:35:23] Thank you, Counsel.



1 We now move on to the Government of the Union of the Comoros. You have the  
2 floor for up to 30 minutes.

3 MR DIXON: [12:35:39] Thank you, your Honours. It's not disputed that the  
4 16 July 2015 decision was one that the Prosecution did not actually base its review  
5 process on. It says as much in its review decision, the Prosecution.  
6 The Prosecution did, yes, reconsider her original decision on the basis of submissions  
7 made by the parties, but not squarely and directly in relation to the errors that were  
8 identified. And the Pre-Trial Chamber, we say, has correctly held that this approach  
9 is unsustainable.

10 The Prosecutor is a party to the proceedings and is not free to decide, in this context,  
11 how she will reconsider her decision. It is not for her autonomously to decide the  
12 basis for her reconsideration.

13 Yes, if she gets new evidence, she has a wide discretion, as the Pre-Trial Chamber has  
14 identified. But when errors are pinpointed, she cannot change the four corners of  
15 that decision and move out of it and do as she pleases. As the Chamber noted,  
16 the Prosecutor does not even attempt to identify a legal basis to support that  
17 approach.

18 When one closely examines the Prosecutor's reconsideration, it is clear that she has  
19 not identified the errors that were found and demonstrated that she assessed them in  
20 light of the specific errors. Hence the submission of the Comoros that the  
21 Pre-Trial Chamber was correct in finding that by 15 May, and I quote, the  
22 Pre-Trial Chamber said she "must demonstrate in detail how she has assessed the  
23 relevant facts in light of the specific directions contained in the 16 July 2015 decision."  
24 That's paragraph 117 of the decision.

25 At paragraphs 48 to 80 of the Prosecutor's second decision on reconsideration, she

1 addresses certain topics which she maintains were raised before the  
2 Pre-Trial Chamber by the parties.  
3 She completely in this way usurps the power of the Pre-Trial Chamber under the  
4 guise of appearing to reconsider her decision, but she does it squarely on the basis of  
5 the issues she says are relevant.  
6 Now, your Honours, there is of course in reality an overlap in those issues and the  
7 issues that were actually identified as errors by the Chamber.  
8 But our submission is that, one, she must be required to directly address each of the  
9 errors as directed by the Chamber. That is important as a matter of principle of  
10 procedure, and for precedent going forward.  
11 Secondly, there are issues raised by the Chamber that she simply hasn't addressed.  
12 And thirdly, she has made the same errors again and new errors.  
13 And it's precisely because Prosecutions or any authorities may well commit similar  
14 errors a second time, or new errors which might be related to the old ones, that  
15 the Chamber must remain seized of the matter until those errors have been  
16 addressed.  
17 Now some of the key issues that she hasn't addressed, or where she has committed  
18 the same errors again or new errors are the following. And I am using some  
19 illustrations here. I am not going through every one, they were contained in our  
20 written submissions. And your Honours will see as I go through the different topics  
21 it conveniently allows me to address a number of the other related questions as well.  
22 So they will be done in tandem.  
23 In respect of the live fire from the helicopters, a critical issues that's been raised  
24 consistently by the Comoros, because your Honours will appreciate that if helicopters  
25 were approaching the ships and firing down on the Mavi Mamara before there were

1 any soldiers on board and then thereafter as well, that is a relevant piece of evidence  
2 that could heighten the gravity of the case and be relevant to showing a plan or policy,  
3 of course taken together with other evidence and of course subject to further  
4 investigation.

5 In respect of this issue, and its relevance to a plan or policy, the Prosecution has not  
6 addressed the precise error which was identified by the Pre-Trial Chamber and that  
7 error is this, that there is reasonable evidence of live fire targeted at civilians from the  
8 helicopters which the Prosecution has not considered and given sufficient weight.

9 And that even if there may be conflicting accounts, which is not unexpected, it's  
10 hardly likely that the perpetrators are going to agree with the victims in respect of  
11 whether they were firing at them or not, that would not preclude an investigation.

12 On the contrary, that would be the primary purpose of further enquiries, particularly  
13 given that it would be highly unusual in such circumstances for everyone to have  
14 seen exactly the same thing and for there to be total agreement, given the horrific acts  
15 that were being played out on the top deck. All the Prosecution has done in her  
16 second decision is to seek to develop more arguments as to why there are  
17 inconsistencies, more reasons why she should not investigate this case. In fact, all  
18 the points she identifies, nevertheless, whether they are correct or not, are ones that  
19 can only rightly be resolved in an investigation on the basis that there is at least one  
20 reasonable inference that there was firing of that nature which requires further  
21 consideration.

22 The point is, she has continued to err in not giving proper consideration and weight  
23 to the consistent body of witness and forensic evidence which is also backed up by  
24 UN findings, which will allow for a reasonable view to be formed that live  
25 ammunition was fired down indiscriminately on civilians before, during and after

1 boarding.

2 It is, your Honours, with respect, preposterous to say, and this is what she concludes,  
3 that she has no information that live rounds were deliberately fired at civilians as  
4 opposed to being warning shots. That's at paragraph 103 of her last decision.

5 Or that all the civilians of all backgrounds might be honestly mistaken about the exact  
6 series of events. And that's another premature finding that's made. That's the role  
7 to be played by Defence counsel, if any case ever gets off the ground. Her duty now  
8 should be to, through interviewing the witnesses, examining the forensics, examining  
9 the ship and interviewing those who were involved in the UN processes -- she is not  
10 bound by what the UN has found, but you can interview the UN investigators and  
11 their witnesses and use all of that to resolve the question of whether there is enough  
12 evidence to bring charges. We are only talking here about opening an investigation,  
13 not charges. It might be at the end of the day that this evidence is not capable of  
14 sustaining a prosecution, but at this stage the step to be taken is to determine that.

15 Secondly, with regard to the impact of the crimes, that's my next heading,  
16 the Prosecutor has failed again to take into account the impact of the crimes of both  
17 the hundreds of victims on the ships as well as the civilian population in Gaza.

18 There is simply no assessment made of the direct effect on the countless victims of the  
19 attack, firstly, while the Prosecution has indicated that there were a number of victims,  
20 an assessment hasn't actually been made about what was the impact.

21 Also, while the Pre-Trial Chamber had indicated that consideration should be given  
22 to the strong message the attack sent to the people of Gaza and the international  
23 concern expressed through the UN, the Prosecutor has failed to take these into  
24 account and is yet again merely focused, and done it today again, on the fact that it  
25 was reported that the aid was ultimately distributed to Gaza in any event. So why

1 are we worried here?

2 Well, as the Prosecutor said, that happened through Israeli controls and under Israeli  
3 laws and there equally are reports out there that say that aid did not get through in  
4 whole or in part, and it was controlled specifically to avoid people benefiting from it.  
5 So we have competing reports, competing accounts. Another prime example. Why  
6 take one account that it all got through when there are others? You need to  
7 investigate that because that could be vital to determining whether you are going to  
8 bring a case in the end.

9 The Chamber had in the original decision rightly highlighted the massive discrepancy  
10 between the whole purpose of the Court being to focus on crimes of international  
11 concern. And here you have the UN saying this is a matter of international concern,  
12 and setting up two enquiries to look into it, let alone the national enquiries, to try and  
13 get to the bottom of this, to resolve the tensions in the region, a very, very critical  
14 region of course, and to try and bring the parties together. So why in such  
15 a situation would the Court want to deviate away?

16 It is therefore, the Comoros says, indeed contradictory and discriminatory for  
17 the Prosecution to have given weight in the Abu Garda case to the wider impact the  
18 attacks on peacekeepers had on a civilian population there, and yet to give no  
19 consideration to the impact that the attack on the ship bringing humanitarian aid  
20 would have on the very people who were meant to receive, waiting to receive that  
21 aid.

22 And at the very least, and it is extremely difficult, you might think, your Honours, for  
23 the Prosecution to make a meaningful differential when in real terms the impact of  
24 those attacks in each situation would undoubtedly reverberate amongst the affected  
25 civilian populations.

1 Just as the civilians in Sudan would feel vulnerable because the peacekeepers were  
2 under attack, so would the vulnerability of civilians in Gaza who depend on  
3 humanitarian aid to survive be heightened by a direct attack on the source of those  
4 supplies.

5 The Pre-Trial Chamber was alive to this disparity in pointing out that in the case  
6 before them there were possibly hundreds of instances of outrages upon personal  
7 dignity, torture or inhumane treatment. Added together with the deaths and the  
8 50 to 58 injuries, it's not something that I have deliberately forgotten, very important  
9 to take into account in the scale of the atrocities. And in saying that those numbers  
10 exceeded cases that have actually been prosecuted such as the Abu Garda case here  
11 before the Court and saying that is a differential that has to be addressed and that it  
12 could be an indicator of gravity. Not saying you have to find that it makes the case  
13 much more serious, but you must take it into consideration in respect of gravity,  
14 grapple with that issue and decide it as the Prosecutor.

15 The third topic on the plan or policy.

16 The Prosecutor commits further errors by finding that even if the pre-boarding live  
17 fire allegations were accepted, there is no reasonable basis to believe that the crimes  
18 were committed according to a plan or policy. She goes so far as to find that there is  
19 no evidence that the IDF operation went according to plan. In other words, taking  
20 the view that this was an operation that potentially went wrong in that the plan must  
21 have been not to harm civilians. Paragraph 125.

22 That is completely at odds with the reasonable evidence that exists of a phased  
23 operation, ie, an operation where there was an attempt to board first by boats  
24 surrounding the flotilla, then helicopters shortly thereafter. They couldn't have  
25 flown from the land, they must have been around and ready to go in very quickly.

1 Also the presence of many surrounding larger boats, including one, and this is not  
2 disputed, which had the head of the navy of the IDF on it. He was there, watching  
3 this operation. And that's confirmed in the Turkel Report.

4 Also there is evidence from Turkel of endless meetings, high-level meetings  
5 beforehand in which this operation was planned, from various ministries, including  
6 the ministry of defence.

7 And then, of course, the evidence of the live fire, not only from the helicopters but  
8 from the surrounding ships as well. There is evidence which the Prosecution has -- I  
9 know this is evidence that came later, but from a leading pathologist from the  
10 United Kingdom, he examined a number of these deaths; one of the 10 killed was not  
11 on the top deck, he was on a lower deck, and from his examination he could have  
12 only been shot from a bullet coming from a surrounding ship, not the helicopters.  
13 So shot from a distance with a high velocity weapon and killed lower down.

14 Yes, this is evidence that was given later, but why wouldn't the Prosecutor want to  
15 look at that evidence and say, "Yes, well, this was interesting"? So there were people  
16 shooting not only from above, but from far away, at the ship. Does that not heighten  
17 the gravity?

18 Once again, all of this needs to be investigated. They have an expert report which  
19 they could take forward.

20 In the second decision you will see that they rubbish that as well. They say, "Ah, no,  
21 well, he doesn't really know what's going on, doesn't have the necessary expertise."  
22 He said, "I'm ready to meet you, I'll go through all the evidence." Why wouldn't you  
23 follow that up?

24 The next heading is under "Abuses in Israel", and this touches on the  
25 Myanmar/Bangladesh argument as well.

1 With respect to the allegations of mistreatment, once persons from the Mavi Mamara  
2 and other ships were forcibly taken to Israel, the Prosecution has completely failed to  
3 address the key error, namely, that it was unreasonable to conclude that there  
4 appeared to be no link, at all, between the IDF troops who boarded the vessels and  
5 then those personnel who were involved in the activities once they were brought  
6 from the high seas into Israel. Even the way I have said it there, it sounds to me, on  
7 any basic reasonable view, to be connected.

8 The Chamber rightly found that this was a prejudgment without any investigation to  
9 say that none of these actions could be related in any way through their activities or  
10 through some common command or planning structure.

11 In her latest decision, the Prosecutor merely reiterates that the abuses that occurred on  
12 Israeli territory could not be relevantly associated with the crimes identified on the  
13 Mavi Mamara. The Prosecution, essentially, just disagrees with the Chamber's  
14 finding. She doesn't actually look at the evidence and whether there is a reasonable  
15 view that could be formed on that basis.

16 It is therefore fitting, we say, that the Appeals Chamber has asked about  
17 the Prosecutor's position recently advanced in the Myanmar/Bangladesh situation.  
18 Her position in the Mavi Mamara case cannot be squared with the one that she has  
19 taken in that case, we submit. The persons detained on the flotilla were forcibly  
20 transferred and deported into Israeli territory. The Palmer Report calls it  
21 deportation, and I will come to the quote later on.

22 Although it is the flip side of the Bangladesh situation, the coercion in the present case  
23 occurred in an ICC member State, the Comoros, that's an element of the offence, that's  
24 the start of the offence, and hence, what happens thereafter when they are taken into  
25 a non-State Party is connected.



1 The rationale of the decision in Myanmar/Bangladesh was that you have to show that  
2 an element takes place within an ICC State Party, or that it's part of a continuing  
3 crime. Well, here we have got one element in Comoros, another element takes place  
4 somewhere else, why is that then not included, particularly if it is deportation? Or it  
5 could be persecution or other inhumane acts as the Pre-Trial Chamber identified in  
6 that decision.

7 I mean, likewise, the imprisonment, the process of imprisoning persons, torturing  
8 them on the evidence that is available, and then taking them into a country where  
9 they are going to be interrogated, where special tents have been set up for that  
10 purpose. The Prosecutor was battling to find an example; I think that's one, I think  
11 you could work it out quite simply. Now, that would require further investigation  
12 of course, but that's the point of the preliminary examination to say, "Yes, that is  
13 a reasonable possibility." It might be in the end we can't prove that beyond  
14 reasonable doubt, but we must investigate that. We would say it is, in any event,  
15 given the evidence that is available, very strong evidence that that was the purpose:  
16 They went out to capture and bring back.

17 There is evidence that they took hundreds of plastic handcuffs with them, and you  
18 don't take those when you board a ship unless you're intending to put people in  
19 handcuffs and bring them back for interrogation. All of that evidence is there.  
20 None of it is referred to. None of it is put together in a proper prosecutorial way to  
21 form a view so that a decision can be made whether or not to open an investigation.

22 PRESIDING JUDGE BOSSA: [12:55:41] I have a question to you.

23 Just for the sake of argument - and I am looking at Article 53(3)(a), and the relevant  
24 rule, which is 108 - assuming that the Prosecutor had paid due regard - you are saying  
25 she didn't - to the directions of the Pre-Trial Chamber, weigh the situation the way

1 she did and come to the conclusion that she did, what would be -- what would the  
2 Pre-Trial Chamber do? Would the Pre-Trial Chamber force the Prosecutor under  
3 this particular article, 53(3)(a), to investigate?

4 MR DIXON: [12:56:54] (Microphone not activated)

5 PRESIDING JUDGE BOSSA: [12:56:56] Microphone. Microphone, please.

6 MR DIXON: [12:56:59] The Pre-Trial Chamber, Madam President, cannot direct  
7 investigation in these circumstances. Its powers are limited to judicial review, but  
8 those are extensive because both areas of law and fact can be identified.

9 And if the Prosecutor had, nevertheless, come to the same conclusion through  
10 identifying and dealing with each of these errors that I have been going through, then  
11 the matter might well be final. It is somewhat hypothetical to say, it would have to  
12 be assessed and looked at at a time when the Chamber's supervisory role would  
13 continue for that purpose. That's not a bad thing, the Prosecution seems to be  
14 worried about that. It's a good thing. Because it allows for transparency, it allows  
15 for all of the evidence to be looked at, for the victims who are here to know that the  
16 Court is seriously, as it is and should be, looking at their case.

17 So if the process had been done properly -- of course, no one is saying that,  
18 nevertheless, we can still come to the position and say you have now got to  
19 investigate, no.

20 PRESIDING JUDGE BOSSA: [12:58:01] Okay.

21 And now I want to go back to the question which was raised by Judge Osuji. Would  
22 the situation be different if it was 53(3)(b)?

23 MR DIXON: [12:58:15] Yes, the situation then is different. Then the judges have the  
24 power to say -- sorry, on the interest of justice issue, which are in a different category  
25 and involve a number of other often complex factors, that is for the judges to decide.

1 But that just reinforces the prominence that's been given rightly to the judiciary in  
2 these matters. And, yes, in questions not of an interest of justice nature, the judges  
3 rightly have the power to insist on their errors being addressed until they are  
4 corrected.

5 PRESIDING JUDGE BOSSA: [12:58:48] Thank you, Counsel.

6 MR DIXON: [12:58:51] "Possible perpetrators" is the next heading.

7 The Pre-Trial Chamber made very clear that the Prosecutor had to address the glaring  
8 omission of not having considered that those who bear the greatest responsibility  
9 could be the subject of an investigation. Yet again, in her second decision,  
10 the Prosecutor begrudgingly refuses to address this matter. She instead concludes  
11 that the direct physical perpetrators could be the object of an investigation, but not  
12 anyone in the command structure. This is the height of prejudgment to at this stage,  
13 without conducting any investigation, decide that no other person than those actually  
14 on board were responsible for this. The Prosecutor completely overlooks a raft of  
15 evidence relevant to this matter, including the Turkel Report itself, which  
16 the Prosecution often cites favourably to support its position, but when it comes to  
17 matters like this is completely silent on it. In that report, the defence minister at the  
18 time himself, Ehud Barak, accepted that he was responsible for the operation, as did  
19 the head of the navy who was there at the time. No reasonable Prosecutor could  
20 merely discount that evidence at this early stage and say, "Well, we find no basis at all  
21 to believe that those high up the chain of command could be investigated," which  
22 obviously would increase the gravity of the case.  
23 That evidence is all before the Prosecutor, including the transcripts of the minister of  
24 defence, the head of the navy, who testified, they have testified already before the  
25 commission.

1 Crimes on Other Ships.

2 The Prosecutor also fixates on the fact that the majority of the crimes took place on the  
3 Mavi Mamara and not other ships, which she uses, once again, to argue that there  
4 was no overall plan. Firstly, it's plainly wrong that there were no serious violations  
5 on the other ships. I am not going to go into the detail, but on the US-flagged ship,  
6 for example, there is evidence that a woman's face was smashed into glass, and  
7 somebody else's nose was broken, passengers lost their sight because of being shot at.  
8 These are not the actions of soldiers acting randomly with no plan. And they also  
9 mirror what happened on the Mavi Mamara where the vast amount of passengers  
10 were. And just because crimes didn't occur on the same scale on one ship doesn't  
11 mean that there is not a coordinated plan to attack the flotilla as a whole. As the  
12 Pre-Trial Chamber pointed out, once again, a premature conclusion.

13 The nature of the crimes.

14 Again, the Prosecutor fails to address the wide-ranging evidence of the severity of the  
15 crimes. Instead she maintains that they can all be put in one little neat category,  
16 outrages upon personal dignity. There are so many examples. I have got one here  
17 of a female passenger who was sexually harassed, who had kissing gestures blown at  
18 her, and was after they had been shot at, this was after people were lying around --

19 THE COURT OFFICER: [13:02:09] Five minutes left.

20 MR DIXON: [13:02:10] -- on the deck.

21 And your Honours might think that that kind of degrading behaviour, in the context  
22 of people having been executed is, frankly, appalling and must, must aggravate the  
23 crimes. Similarly, allegations of desecration of the dead, there is evidence that was  
24 put before the Prosecution of a body being bitten by dogs and being urinated on. I  
25 mean, all of this evidence put together, and I am only dealing with an illustration of it

1 here, it goes on, it goes on, it adds up, must show the seriousness of these events.  
2 CCTV is something else the Prosecution says, "Well, that doesn't show that there was  
3 any plan, no relevance to seeking to conceal the crimes." I mean, as the  
4 Pre-Trial Chamber found, the Prosecutor erred in not cutting through this endless  
5 waffle on this point and just addressing the blindingly obvious fact that the  
6 destruction of records to conceal crimes could show a degree of coordination, as  
7 opposed to being a random sporadic set of acts.  
8 Moreover, over this reveals a blatant double standard. The Prosecution keeps saying,  
9 some of the witnesses' evidence who were shot at might be tainted by bias because,  
10 according to the Prosecutor, they might be trying to blame the IDF. And yet the IDF,  
11 in destroying evidence, according to the Prosecutor, doesn't necessarily reveal their  
12 inner intentions or a desire to get away with the crimes that they have committed.  
13 That, you may think, is impunity in action.  
14 Finally, your Honours have asked about the continual determination.  
15 By that, the Prosecutor meant that she is not going to determine the issue now,  
16 because, as my learned friend has said, it has no effect on the gravity of the case.  
17 And this is whether there was, essentially, an unlawful interception.  
18 The Prosecution accordingly found that there was no unlawful attack on a civilian  
19 object, the matter that I referred to earlier in response to Madam President's question.  
20 On any view, any unlawful attack would certainly increase the gravity of the case  
21 being examined. We highlighted this in our first judicial review application, making  
22 clear that attacks on civilians on the high seas undoubtedly meant that  
23 the Prosecution erred in deciding that this case was completely not up to the gravity  
24 threshold.  
25 Given that the UNHRC had found that the interpretation was unlawful, and in light

1 of the fact that alternative conclusions are permitted in the preliminary examination  
2 stage - yes, Palmer said it wasn't, but a learned panel consisting of a former ICC judge,  
3 a former chief prosecutor of the Special Court for Sierra Leone, the late Sir Desmond  
4 de Silva, they found, together with the Red Cross, has found that it was an unlawful  
5 attack. So we have an inconsistency here. Both are potentially reasonable, they  
6 should be investigated, not choosing one because that helps devalue the case.  
7 All in all, when you consider these points, your Honours, the process of  
8 understanding the Prosecution's reasoning is mind-boggling. It huffs and puffs in  
9 a desperate attempt to convince the reader that reasonable conclusions have in fact  
10 been reached when quite the opposite is plainly evident. Even if there are  
11 alternative inferences, the Prosecutor is obliged to initiate an investigation, yet she  
12 goes, in our submission, to astonishing lengths to close down and ignore all  
13 reasonable inferences that the case is not serious enough.

14 Your Honours, those are our submissions on Group B.

15 PRESIDING JUDGE BOSSA: [13:06:02] Judge Morrison has a question for you,  
16 Counsel, before you sit down.

17 JUDGE MORRISON: [13:06:07] Mr Dixon, does my memory serve me, is it the case  
18 that this concerns all of the vessels involved, not simply the Mamara, were actually  
19 towed into port as opposed to proceeding under their own power?

20 MR DIXON: [13:06:26] Yes, your Honour. As far as I recall, that was the case.  
21 And they were kept there for a considerable period of time. Some, some never  
22 returned. But they were towed, or at least escorted, under a circle of various vessels,  
23 many of those having been there during the attack itself.

24 JUDGE MORRISON: [13:06:49] I'm simply considering the question of pre-planning  
25 in respect to the other vessels, because obviously before you can take a ship into tow,

1 you have to send a tug that is assessed to be suitable for towing a ship of the  
2 dimensions that it's intended to tow.

3 MR DIXON: [13:07:13] Yes, that is a relevant consideration, that's certainly a matter  
4 that an investigation would turn up. Those are matters, if I recall, that have been  
5 directly addressed to some extent on the evidence in the UN reports as well.

6 JUDGE MORRISON: [13:07:28] That's why I am asking you to refresh my memory  
7 because I read that report a long time ago and haven't read it since.

8 MR DIXON: [13:07:36] I will, your Honour, if it is in order, over the break pull out  
9 those references, if that assists because I do recall --

10 JUDGE MORRISON: [13:07:41] I don't want to use too much time on that point, but  
11 I just wanted to make sure it was present in the proceedings.

12 MR DIXON: [13:07:47] Yes. And the surrounding ships taking the flotilla boats in  
13 would have also had to know what was going to happen. If they went then, not that  
14 they were going to just return, but that they were going to intercept them and bring  
15 them back. And that is confirmed by the fact that they were waiting on the shore in  
16 Ashdod for everyone in an orderly fashion.

17 JUDGE MORRISON: Thank you.

18 THE COURT OFFICER: [13:08:11] We have reached 30 minutes, your Honours.

19 PRESIDING JUDGE BOSSA: Thank you.

20 Can we now hear from the Legal Representative of the Victims, 15 minutes.

21 MR DIXON: [13:08:22] Thank you, your Honours. You will have to bear with me  
22 a bit longer. The victim submissions are obviously much shorter and focus on their  
23 particular interests and concerns based on the instructions that we have received from  
24 them. We have sought to keep in touch with them over a concerted period of time  
25 and gain their written and oral views as the proceedings have unfolded.

1 The victims have consistently maintained that the Prosecution has appeared to treat  
2 the victims in the Abu Garda case in a different way to those in the flotilla and those  
3 in Gaza.

4 The persons who had been killed as peacekeepers, as well as the civilian population,  
5 were affected by the attack and their view has consistently been that they can't see the  
6 real difference to justify why that case was taken up and theirs has been ignored.

7 As your Honours know, 12 persons were killed in the Abu Garda case and thousands  
8 affected. The numbers are, they say, very much the same in the present case and, in  
9 fact, higher in respect of those who were directly injured, tortured and abused, as the  
10 Pre-Trial Chamber has pointed out.

11 The victims' submission is that no rational distinction can be made so as to permit an  
12 investigation in one case and not the other. It would be foolhardy for the Prosecutor  
13 to try to justify that the deaths of peacekeepers automatically required investigation  
14 to the exclusion of those carrying humanitarian aid to Gaza. In fact, the victims have  
15 often expressed they regard this as an insulting stance to take and one that must be  
16 discouraged in this case but also in all cases before the ICC.

17 This form of conduct clearly brings Article 21(3) into play because the law is not being  
18 applied, it would seem, consistently to protect fundamental human rights norms and  
19 prosecute violations thereof without any distinction on recognised grounds.

20 The victims wish to emphasise that far from addressing the errors identified by  
21 the Chamber, the Prosecution has used the second decision to really go after them  
22 and discredit them as potential witnesses. They have all offered to be interviewed  
23 by the Prosecutor and for her to conduct a site visit of the Mavi Mamara and other  
24 ships that are available. She has not taken up this offer, and instead said that none of  
25 the evidence ultimately can be treated with anything other than caution. That's the



1 word that she uses over and over again.

2 The Prosecution, for example, highlights that lay witnesses would not be able to  
3 differentiate between lethal and less lethal weapons. She says this on a number of  
4 occasions. She provides no expert evidence in support of this assertion and nor  
5 would it be appropriate for her at this point. It's not her role to look to find evidence  
6 to attack potential Prosecution witnesses.

7 Moreover, the Prosecution plainly overlooks the evidence of a number of passengers  
8 on board who did have military experience and who could tell the difference between  
9 different types of weapons and whether the ammunition being fired was live or not.  
10 For example, one of the witnesses and a victim is a retired US army colonel with  
11 29 years of experience in the US military, having served in Nicaragua, Grenada,  
12 Somalia, Sierra Leone and Afghanistan, and clearly stated that what she saw was live  
13 ammunition being fired onto the ship of the Mavi Mamara based on her experience.  
14 Others on board also had military experience and said they saw live ammunition.  
15 None of this has been taken into account.

16 The Prosecutor goes on to say that even if the victims were able to say that it was live  
17 ammunition, then they were mistaken about whether it was intended actually to  
18 harm them. That's at paragraphs 103 and 104 of her decision.

19 The victims are quite outraged by this type of analysis. When they gave evidence,  
20 they saw people being shot, when they saw soldiers standing over passengers and  
21 executing them. They saw soldiers shooting at people from the helicopters who  
22 were falling down in front of them, and then soldiers executing many of them right in  
23 front of them.

24 Either, your Honours, we are talking about a lot of warning shots that went astray  
25 and killed people, or the Prosecution has erred here. No reasonable prosecutor

1 could make a finding at this stage that this could all be down to warning shots that  
2 went wrong, especially given the evidence she has got, including video footage which  
3 is available of what appears to be soldiers executing people, people trying to crawl  
4 away, soldiers following them and shooting them.

5 What the victims also find surprising is that instead of addressing the errors that  
6 the Chamber has outlined, not only does she discredit them as victims but the  
7 Prosecutor then goes on to rely on some of their testimony where that supports the  
8 IDF position.

9 For example, the Prosecution says at one point, this is paragraph 103: Even the  
10 witnesses cited by the Comoros agree that the IDF deployed a range of weapons and  
11 tactics, including nonlethal, lethal, ones that made a lot of noise. And even the  
12 Comoros victims identified that there was general confusion, that different methods  
13 were used, including flashbang grenades. Even they say there was poor visibilities.  
14 All these things the victims say, "Yes, I mean, it was dark, I couldn't see everything",  
15 she uses that, having generally discredited them and not relied on them, regarded  
16 them as to be treated with caution, she uses that then to say that this supports the  
17 notion that nonlethal weapons were used at least at first and also that it supports the  
18 Turkel commission's finding and that commission found that there was no firing from  
19 the helicopters and that the only force used by the victims -- sorry, used by the  
20 soldiers from the helicopters was flashbang grenades that were deployed from the  
21 first helicopter in the initial stages.

22 "The Turkel Commission" also - this is their own words - "concluded that during the  
23 operation, the IDF soldiers alternated between lethal and nonlethal force as needed to  
24 protect themselves and other soldiers, depending on the threat posed."

25 She actually quotes their finding that no firing from the helicopters, really the IDF

1 were the ones who were threatened, they were under attack, not the victims, and uses  
2 what the victims have said to support it. The paragraphs are right one after the  
3 other and the victims have said to us they can't believe that the evidence is to be  
4 treated suspiciously and yet when it favours what is found in Turkel, then it's pieced  
5 together to say, well, how can you say there is a reasonable basis that civilians were  
6 deliberately attacked?

7 The victims take particular exception to the Prosecutor using and endorsing the  
8 Turkel Report while at the same time saying that the findings of the UN bodies -- and  
9 we've seen an example of it today where they can't really be trusted and looked at.  
10 We have to make our decisions independently. And this is despite two UN reports  
11 highlighting the seriousness of the case and saying that there should be further  
12 investigation.

13 The UNHRC reports said, for example, that the attack "betrayed an unacceptable level  
14 of brutality. Such conduct cannot be justified or condoned on security or any ...  
15 grounds. It constituted a grave violation of human rights law and international  
16 humanitarian law."

17 PRESIDING JUDGE BOSSA: [13:16:36] Please slow down for the sake of the  
18 interpreters.

19 MR DIXON: [13:16:38] I do apologise. I was quoting the UN report and read it too  
20 quickly.

21 They do also say that there should be a right to an effective remedy that should be  
22 guaranteed for all victims.

23 The Palmer report said "No satisfactory explanation has been provided to the panel  
24 by Israel for any of the nine deaths. Forensic evidence showing that most of the  
25 deceased were shot multiple times, including in the back, or at close range has not

1 been adequately accounted for in the material presented by Israel."

2 And this is important on the issue of Myanmar/Bangladesh. There was significant  
3 mistreatment of passengers of Israeli authorities after the takeover of the vessels had  
4 been completed through until their deportation. This included physical  
5 mistreatment, harassment, intimidation, unjustified confiscation of belongings and  
6 then denial of timely consular assistance.

7 Surely the victims say the Prosecutor is entitled to take into account these reports as  
8 part of its preliminary examination, not just focus on one that was commissioned by  
9 the Israeli government. Look at what the UN said and use that as a basis to examine  
10 whether or not there was a plan or policy. What was the (Overlapping speakers).

11 THE COURT OFFICER: Five minutes left.

12 MR DIXON: [13:18:09] Is that my time?

13 Your Honour, if I may just -- it's five minutes, sorry. I was getting confused with the  
14 exact timings.

15 The Prosecutor tries to bury the errors that she has made in really overly generalised  
16 and essentially we would say meaningless assertions. And you see some of that in  
17 the submissions today.

18 One of the key issues was whether there was a plan or not and the Prosecutor deals  
19 with that by saying, and I quote the exact words, the "Prosecution reached this  
20 conclusion concerning any plan or policy" that there was no evidence of it "based on  
21 the circumstances of the interception and boarding operation itself, including but not  
22 limited to the occurrence of the identified crimes only aboard the Mavi Mamara, the  
23 context of violent resistance aboard [the ship], the manner in which the boarding  
24 operation was conducted, and so on."

25 So generalised: These are the factors I took into account. But how did you take

1 those factors into account? How did you look at the evidence to reach that  
2 conclusion? It has no meaning unless you unpack it.

3 The Prosecutor implies that the so-called resistance that the IDF saw from certain  
4 victims posed meant that at that stage it was impossible to determine whether there  
5 was a reasonable basis for an overall plan.

6 The victims have said over and over again that they are dismayed that their accounts  
7 are being attacked by the Prosecutor for resisting the IDF when they were attacked.

8 The Prosecutor goes so far as to say that there was a heightened risk of bias because  
9 they were trying to blame the IDF, but the Prosecution entirely overlooks that the  
10 victims' evidence has been that they were attacked first when the IDF took control of  
11 the ship, and in such a situation, as they have said, certain of them obviously tried to  
12 protect themselves. There's a wealth of evidence that shows that many of those who  
13 were shot did in fact nothing to try and defend themselves and were in fact simply  
14 trying to hide away. There is video footage, as I have mentioned, showing this as  
15 well.

16 How can the Prosecutor simply ignore all of the evidence which points to the need for  
17 an investigation, while highlighting, in snippets, elements of resistance as though that  
18 creates a basis for saying "I don't need to do anything", which ultimately accords with  
19 the position taken by Turkel and the IDF?

20 We also say that the Prosecutor should take into account expert evidence, which is  
21 now available, from a leading military expert who has acted in UN enquiries. Yes,  
22 this evidence has come later, but it is consistent with showing that the IDF's account  
23 that this was purely defensive has no foundation. It's new evidence but it's there for  
24 the Prosecutor. There is no reason why she couldn't take it if she wanted to. Again,  
25 she has sought to discredit this expert, despite not having investigated the matter or

1 put forward any of her own expert evidence.

2 Precisely the same applies with the forensic expert, the UK Home Office pathologist

3 that I mentioned. He actually has been to the ship several times and examined it,

4 looking at the bullet holes, the angles, the trajectories, and produced the report on

5 that. But the Prosecution has said, unreliable, no need to focus on it or look at his

6 report or interview him any further.

7 She has all of this evidence in her possession now, and the victims say she should do

8 the right thing by using it to open an investigation finally.

9 Thank you, your Honours.

10 PRESIDING JUDGE BOSSA: [13:22:18] Thank you, counsel. We will now hear

11 from the counsel from the Office of Public Counsel for Victims; 15 minutes.

12 MS MASSIDDA: [13:22:47] Thank you, Madam President.

13 The submissions in relation to the Prosecutor's implementation of the request for

14 reconsideration are based essentially on conversation that we had with our clients, the

15 victims that we represent in these proceedings.

16 For the information of the Chamber, the victims that we represent are, essentially,

17 journalists of different nationalities, there are some parliamentarians from different

18 European countries, and also some people living in Turkey and some social workers

19 who were in the flotilla.

20 The Group B questions addresses the Prosecutor's implementation of request for

21 reconsideration. In this regard, our clients have expressed the view that

22 the Prosecutor, in their view, has expressly disregarded the methodological guidance

23 provided by the Chamber and failed to assess correctly the five errors identified by

24 the Chamber.

25 In this sense, victims reiterate that the decision of the Chamber was not in compliance

1 with the guidance provided by the Chamber, and that the Prosecution decided, chose  
2 not to address effectively the errors indicated by the Appeals Chamber.

3 In relation to question B, the victims indicated, as also indicated by my learned  
4 colleague, that the Prosecution applied, in their view, a completely different standard  
5 from the one used in the Abu Garda case, at the detriment of both the victims of the  
6 flotilla and those in Gaza. The Prosecutor failed to weigh the scale of the crimes  
7 together with their impact on direct and indirect victims, including the impact on the  
8 international community.

9 Moreover, while it is evident that the number of killings in the two cases is almost  
10 identical to the ones that took place on the Mavi Mamara, the Prosecutor fails to  
11 attach any relevance to the 50 persons wounded and to the hundreds tortured, which  
12 offsets any consideration based on the specific quality of the concerned victims in the  
13 Abu Garda and in the Banda cases.

14 In this regard, the Prosecutor explicitly decided to disregard the Chamber's guidance  
15 on the relevance of impact of the crime on the victims and their families, on the  
16 population of Gaza, on the international community as a further factor and indicator  
17 of sufficient gravity.

18 In fact, what the Prosecutor did was simply to reiterate her views on the, and I quote  
19 her expression, "relatively small" number of victims affected by the crime, stressed the  
20 fact that the Gaza population received, in any case, supplies carried by the vessel, and  
21 confounds the concept of subjective social alarm with the objective concern of  
22 international community caused by the events, which, as indicated by the  
23 Pre-Trial Chamber, *inter alia*, resulted in several fact-finding missions, including the  
24 UN Human Rights Council and the UN Secretary General.

25 The Prosecution has, throughout the second reconsideration, maintained that the

1 potential cases that could be pursued is inherently limited to an event encompassing  
2 a small number of victims.

3 Moreover, highlighting that only nine passengers were killed, and around 50 others  
4 were injured on board the Mavi Mamara, and that no serious injuries occurred during  
5 the IDF interception of the remaining seven vessels, the Prosecutor determined that  
6 these figures were, and I quote again, of "relatively limited proportions as compared,  
7 generally, to other cases investigated by the Office."

8 Well, your Honour, the Prosecutor, in accordance with words of my clients, ignore  
9 the impact on the scale of the crimes of events in the Rachel Corrie and the  
10 Eleftheri Mesogios vessels, limiting her analysis only to the consequences arising from  
11 the interception of one out of seven vessels.

12 And plus, the Prosecution did not even address at all the number of indirect victims  
13 of the alleged crimes. I refer, for instance, your Honours, to the families of over 500  
14 direct victims, only considering passengers on board of the Mavi Mamara.

15 Regarding the impact of the crimes and question C, the Prosecutor concluded that it  
16 does not appear that the conduct of the IDF during the incident can be considered to  
17 have had a significant impact on the population in Gaza.

18 In this regard, in our submission, the Prosecution fails to notice that her reference to  
19 the reasoning made by the Pre-Trial Chamber in the Abu Garda case, regarding  
20 a grave impact on the local population of the attack in that case, can be reasonably  
21 applied in the context of the situation at hand. Although the supplies carried by the  
22 vessels were ultimately later distributed in Gaza, the impact of interception increased  
23 the reluctance of donors and volunteers to provide their assistance, damaging  
24 therefore the conditions of the local population.

25 The alleged impossibility to consider the flotilla as a peacekeeping or humanitarian



1 mission, addressed at length by the Prosecutor, is not determinative of the impact of  
2 the alleged crimes. Rather, it seems to be an overly formalistic interpretation that  
3 fails to acknowledge that the population is subject to a protracted and immense  
4 suffering.

5 Therefore, in our submission, in answering to question D, the Prosecutor's assessment  
6 of the crimes in this instance is in contradiction with that of Myanmar or Bangladesh.  
7 In particular, the Prosecutor had the possibility to consider the conduct and  
8 consequences on the territory of Israel of some of the alleged crimes on the basis of  
9 their continuing nature.

10 However, she unreasonably restricted the territorial jurisdiction of the Court by  
11 failing to take into account all the factual parameters of the continuous crimes of  
12 inhuman and degrading treatment and torture, namely their conduct, consequences  
13 and circumstances.

14 In our submission, the Court retains jurisdiction over the crimes allegedly committed  
15 during the victims' transportation to and detention in Israel. In particular, the Court  
16 retains jurisdiction, territorial, over the continuous crimes of inhuman and degrading  
17 treatment and torture that allegedly took place in part on Israeli territory, but started  
18 on the ships.

19 Discussing now question E, the Prosecution contention that the alleged misconduct  
20 conducted on Israeli soil cannot be associated with the alleged crimes committed  
21 aboard the Mavi Mamara is in direct contradiction with the notion of continuing  
22 crimes as well and with the arguments developed by the Prosecution itself --

23 THE COURT OFFICER: [13:32:12] Five minutes left.

24 MS MASSIDDA: [13:32:14] -- in its request related to Myanmar. While the Statute  
25 does not provide a definition of the expression "conduct in question" for the purpose

1 of Article 12(2)(a), its meaning can be deducted from Article 30 of the Statute, which  
2 indicates by implication that the material elements of the relevant crimes are to be  
3 construed as including their three distinct components: conduct, consequences and  
4 circumstances.

5 In this regard, states are generally allowed under international law to exercise their  
6 criminal jurisdiction on the basis of what is called the constructive localisation of any  
7 constituent element of a crime within their territory.

8 Therefore, in our submission, the Prosecutor's analysis of the territorial jurisdiction of  
9 the Court regarding the situation fails to properly assess the conduct element of the  
10 alleged crimes by disregarding the fact that the criminal conduct of inhuman and  
11 degrading treatment and torture continued during the transportation and detention  
12 of the passengers into Israeli territory.

13 Turning to question F, the Prosecutor was not correct in making a conditional  
14 determination of the unlawfulness of interception of the flotilla in the absence of  
15 a substantive investigation. In particular, we posit that it was unreasonable for  
16 the Prosecutor (1) to disregard the findings of the Human Rights Council report; and  
17 (2) to fail to discriminate in favour of the Human Rights Council report in case of  
18 conflicting views amongst the four reports she assessed, and in light of the fact that  
19 this is the only, if I can put it that way, "natural independent" report on the records; (3)  
20 to ultimately provide an analysis that is mainly premised on the assumption that the  
21 blockade is lawful.

22 For brevity, on this issue of lawfulness of a blockade, I simply refer to my submission  
23 number 27, paragraph 38 to 46.

24 Moreover, and finally, the lawful or unlawful character of the Israeli blockade is a key  
25 issue to determine the legality of the conduct within the scope of a situation. Indeed,

1 were the blockade considered lawful, the Prosecutor should analyse whether the  
2 attack conducted by the IDF was proportionate or not. Conversely, were the  
3 blockade considered unlawful, the Prosecutor should consider whether the IDF  
4 followed its rules of engagement with the civilians in the vessels. Other cases in  
5 examination and investigation would have been needed.

6 In conclusion, the Prosecutor failed to consider the expert related to the lawfulness of  
7 a blockade and the interception of the vessels on the basis that the legality of a  
8 blockade is the subject of controversy.

9 This approach is, in our view, unreasonable, since the Prosecutor was only required to  
10 assess whether there is a reasonable basis to believe that the blockade is unlawful, and  
11 the Prosecutor failed to do so. Even if the lawfulness of a blockade was contested,  
12 there is a reasonable basis to believe that the blockade is unlawful because the  
13 reasonable basis standard is the lowest evidentiary threshold before the Court, as we  
14 discuss later today.

15 If I may use one minute of indulgence of the Chamber, I would like to touch upon one  
16 issue taken by my learned colleague of the Prosecution today.

17 PRESIDING JUDGE BOSSA: [13:36:54] Let it be one minute because we are already  
18 behind schedule.

19 MS MASSIDDA: [13:37:01] Sorry, Madam President.

20 PRESIDING JUDGE BOSSA: [13:37:03] It must be one minute because we are  
21 already behind schedule.

22 MS MASSIDDA: [13:37:06] I am referring at the transcript of today's hearing page 69,  
23 line 10, when the Office of the Prosecutor explained that on the facts they were unable  
24 to find that the identified crimes were committed according to a plan or policy.

25 Now, this issue is relevant as shown by some of the questions put by the Bench to the

1 determination of whether there is an inextricable link between what happened on the  
2 ship and what followed on Israel soil. And to this purpose I want simply to recall  
3 a few examples by the letter of referral by the State of Comoros, which may shed  
4 some light. Paragraph 36, for instance:

5 "The Gaza flotilla raid is characterised as code named 'Operation Sea Breeze' by IDF,  
6 as the boarding and seizure of six vessels of the flotilla. The flotilla was surrounded  
7 by four battleships, two submarines, and 30 zodiac boats, each bearing 10 armed men",  
8 who probably were going fishing that day all together in their military clothes.

9 Another example --

10 PRESIDING JUDGE BOSSA: [13:38:35] Wind up, please.

11 MS MASSIDDA: [13:38:37] Fine, I will leave with that. Thank you, your Honour.

12 PRESIDING JUDGE BOSSA: [13:38:39] Okay, thank you, Counsel.

13 We will now hear from the Office of the Prosecutor, who may briefly respond, in  
14 five minutes.

15 MR STEWART: [13:38:51] Thank you, Madam President, your Honours. I will be  
16 very brief indeed.

17 I would submit that we have done what the Pre-Trial Chamber requested and even  
18 what my friend Mr Dixon claims we should have done. I will give you one example.  
19 The whole issue with respect to live fire, I think the easiest thing for me to do is  
20 simply to refer you to the final decision of the Prosecutor, paragraphs 99 to 123 and  
21 263 to 275.

22 One of the matters that we had to consider, which my friends have not placed a great  
23 deal of emphasis on, perhaps understandably, but in relation to the issue of policy or  
24 plan, was the nature and level of resistance on the Mavi Mamara. Clearly, the IDF  
25 was under orders to enforce the blockade. The fact that they were going to enforce

1 the blockade, even by boarding a ship that had disobeyed the direction to stop, does  
2 not mean that there was a plan or policy to kill civilians. And I think I would submit  
3 to you that that is something to take into account.

4 We did look at the killings in detail and I would refer the Chamber to confidential  
5 annex D. We did not dismiss the pathologist report. I would refer the Chamber to  
6 paragraph 172 of the final decision. We did address the public statements of high  
7 Israeli officials after the fact. And I would refer the Chamber to paragraph 169 of the  
8 final decision.

9 We may have misheard, but with respect to the issue of deportation, the reference in  
10 the Palmer report, the Palmer-Uribe report was the deportation from Israel, not from  
11 the ship.

12 We did address the issue of desecration of the dead at paragraphs 300 to 303 of the  
13 final decision. And of sexual and gendered based crimes alleged at the final decision  
14 paragraphs 297 to 299.

15 And I would submit to you, and perhaps it's understandable, given the focus of this  
16 group of questions, that when you listen to our friends, we are really very far from  
17 the issues certified for appeal.

18 And, you know, Mr Dixon, I say with respect in his submissions, and he has  
19 acknowledged this, he is mixing up evidence that was made available after the  
20 Pre-Trial Chamber's first request to us to reconsider. And of course the focus of this  
21 appeal is that first request and the information that the Prosecutor had and how  
22 the Prosecutor treated that information as a function of that request.

23 And when Mr Dixon speaks on behalf of the victims as passionately as he does, we  
24 are away outside the scope of this appeal. And so I just make that point and I  
25 suppose we will come back to it at the very end.

1 Thank you.

2 PRESIDING JUDGE BOSSA: [13:42:21] Okay, we still have one intervention left  
3 from the Office of Public Counsel for Victims, but we will have to postpone this  
4 intervention to after lunch. And because we are behind schedule -- sorry, from the  
5 Government of the Union of the Comoros, the intervention left is from the  
6 Government of the Union of the Comoros. I am sorry for the mistake. But we are  
7 behind schedule, and we need -- let me consult and come back to you.

8 (Appeals Chamber confer)

9 PRESIDING JUDGE BOSSA: [13:43:41] We will reconvene at 2.30 to continue with  
10 the proceedings.

11 The matter is adjourned.

12 THE COURT USHER: [13:43:54] All rise.

13 (Recess taken at 1.43 p.m.)

14 (Upon resuming in open session at 2.32 p.m.)

15 THE COURT USHER: [14:32:44] All rise.

16 Please be seated.

17 PRESIDING JUDGE BOSSA: [14:33:10] The proceedings are resumed. Can we now  
18 hear from counsel from the Office of Public Counsel for Victims. Ten minutes.

19 MS MASSIDDA: [14:33:42] With due respect, your Honour, I think it's the turn from  
20 the Government of Comoros. Thank you.

21 PRESIDING JUDGE BOSSA: [14:33:47] Yes, yes, yes. It's the heavy lunch I had that  
22 is disturbing me.

23 The Government of the Union of Comoros, you have the floor and you should  
24 respond within five minutes.

25 MR DIXON: [14:34:00] Thank you, Madam President, your Honours. A brief reply.

1 In respect of the matter of live fire, which is related to the other point Mr Stewart  
2 highlighted about a lack of a policy or plan, it is correct that we didn't spend very  
3 much time on the level of resistance or the resistance so-called itself because there  
4 wasn't, frankly, very much of it. The ship had over 600 passengers on, most of them  
5 were in shock, trying to hide away. The few that tried to defend themselves when  
6 they were shot at, as I said, obviously needed to do so in order to try and survive.  
7 They have said that in their statements, which have been given to the Prosecutor, and  
8 they could be interviewed. And many did nothing to even try and defend  
9 themselves. They just hid away.

10 There is one account which the OTP has of a victim V-115 who said that he witnessed  
11 live fire from a helicopter. He was shot in both ankles while leaning against a wall  
12 on the ship trying to hide away from the bullets. He described the helicopter circling  
13 and firing bullets randomly. His evidence was not only confirmed and corroborated  
14 by the evidence of live fire from the helicopters from other witnesses, but also by his  
15 own recorded injuries while he was hiding, not resisting.

16 And yet, despite this cogent account, the OTP in their last decision questioned his  
17 evidence on the basis of really trivial criticisms, such as, and this is just one example,  
18 they said that in his statement he did not refer to the noise and the shooting which  
19 resulted when the first boarding attempt by sea failed shortly before the helicopter  
20 arrived.

21 So they said, well, this is an omission in his statement, he hadn't dealt with it. And  
22 that was one of the reasons, amongst many, that they said meant that his evidence  
23 should be treated with caution.

24 So when Mr Stewart says that they have looked at this issue, the question we ask is  
25 why wasn't that statement considered? Why was there a knee-jerk reaction towards

1 resistance, so-called resistance when there were countless persons in his position who  
2 were hiding away in fear of their lives.

3 Similarly when it comes to the question of a policy and saying there is no information  
4 that there was a plan to directly target civilians, well, on the one hand we say there is  
5 a reasonable basis to investigate that. But even if you have question marks about  
6 that, as the Prosecution will know, the other criminal theories that can be looked at,  
7 forms of indirect intention can still amount to war crimes and crimes against  
8 humanity.

9 If there was an operation planned where there was a clear risk that civilians would be  
10 harmed in this fashion and yet they proceeded regardless, that can give rise to  
11 criminal intent as well. And what about command responsibility? No one, and we  
12 will come on to this, no one has been prosecuted for these crimes, even though people  
13 have taken responsibility at the highest level. Wouldn't that create a basis, in  
14 addition to all the others, of investigating this case?

15 One point that was mentioned I think I should clarify is when I mentioned  
16 deportation, I think Mr Stewart asked whether I was referring to deportation from the  
17 ship to the land to a state which is not a party to the ICC, and my answer is certainly  
18 yes, that that is one of the matters that could be investigated in line with the clear  
19 position that the Prosecution has taken in the Myanmar/Bangladesh case. Even  
20 though it's the reverse, other way around, the legal theory still applies, that one of the  
21 elements takes place in a signed-up party, together with lots of other offences as well.  
22 Yes, the evidence of the forensic pathologist is new evidence, we have said that from  
23 the outset. It has taken some time for the site visits to occur. That was provided by  
24 the Comoros to assist with the investigation. And yet what the Prosecution does  
25 with regard to his evidence, he said it should all be once again treated with caution.



1 They say he's not a ballistics expert, so beware. When, in fact, as he explained in his  
2 report, we got a ballistics expert to work with him --

3 THE COURT OFFICER: [14:39:07] Five minutes are up.

4 MR DIXON: [14:39:09] -- to prepare that matter. So not only is the old evidence  
5 treated with caution, but so is the new evidence.

6 Those are my submissions, your Honour.

7 PRESIDING JUDGE BOSSA: [14:39:19] Thank you, Counsel.

8 We now proceed to the third session, which encompasses questions in Groups C  
9 and D.

10 And we will start with the Office of the Prosecutor. Fifteen minutes.

11 MR GUARIGLIA: [14:39:37] Thank you, your Honours. I will address the seven  
12 remaining questions in Groups C and D in the next 15 minutes.

13 Due to the existing time constraints, I will have to address some of these points quite  
14 swiftly.

15 Question A of Group C your Honours asked whether the approach of the Prosecution  
16 in this situation is consistent with the "reasonable basis" standard in Article 15.

17 As a technical matter, I first note that this situation was referred to the Court under  
18 Articles 13(a) and 14 of the Statute. I will accordingly frame our answer in the

19 context of Article 53(1) and not Article 15. However, I know that for the purposes of  
20 your Honours' question, this is indeed a distinction without a difference, since both

21 Articles 53 and 15 contain the same "reasonable basis to believe" standard, as  
22 illustrated also by Rule 48 of the Rules of Procedure and Evidence.

23 Your Honours, the Prosecutor properly applied this standard in this situation. This  
24 is certainly not in issue in relation to our jurisdiction analysis under Article 53(1)(a)

25 where we determined that there was a reasonable basis to believe that the identified

1 crimes had been committed.

2 In relation to the gravity requirement, our view was that no potential case arising  
3 from the situation was of sufficient gravity, and this was based on a mixed assessment  
4 of law and fact.

5 With regard to the law, this is assessed on a correctness standard. We apply the law  
6 objectively, to our best understanding.

7 On factual matters relevant to the gravity analysis, such as whether the identified  
8 crimes were committed pursuant to a plan or policy, again we submit that we did  
9 properly identify and apply the "reasonable basis to believe" standard.

10 The majority of the Pre-Trial Chamber, as it was previously composed, seemed to take  
11 a different view of the standard and our application of it. We did our best to explain  
12 in our final decision why we reached a different conclusion than that of the majority.

13 This explanation included quite an extended discussion on our understanding of the  
14 standard as well as the manner in which it should be applied. And we stressed,  
15 among other considerations, the importance of a holistic assessment of the totality of  
16 the evidence, as well as the need for a thorough source evaluation. Your Honours  
17 can find the relevant passages at reference C1.

18 For the reasons expressed in our brief, and which Mr Cross briefly touched upon, our  
19 understanding is that the manner in which we proceeded was fully permitted by  
20 Article 53(3)(a) and Rule 108(3).

21 For similar reasons, turning to question B in Group C, we do not consider the  
22 Prosecution abused its discretion under Article 15 in determining that an  
23 investigation might not be open despite the existence of some information indicating  
24 the possible commission of crimes under the jurisdiction of the Court.

25 First, your Honours, the existence of information on crimes within the jurisdiction of

1 the Court, in the meaning of Article 15(1), cannot as a matter of law be  
2 incompatible with a subsequent determination by the Prosecutor that, upon analysis,  
3 an investigation should not be open because the conditions of Article 53(1) have not  
4 been met.

5 This follows from the structure of Article 15, which makes clear that even for *proprio*  
6 *motu* action, Article 15(1) information is only a potential trigger for the Prosecutor's  
7 activities. The existence of such information does not allow the Prosecutor to bypass  
8 the Article 53(1) conditions. This is made clear by Article 15(3) and Rule 48, read in  
9 combination. The same logic applies to situations that have been referred to the  
10 Court, such as this one, which are addressed under Article 53 directly.

11 Second, your Honours, we do not understand the Prosecutor's determinations under  
12 Article 53(1)(a) and (b) to be discretionary in nature, since they primarily involve the  
13 verification of statutory legal criteria prior to the opening of any investigation.

14 Rather, any residual discretion exists principally in Article 53(1)(c), a matter that the  
15 Prosecutor did not have to consider in this situation.

16 For all these reasons and consistent with our previous positions and practice, we do  
17 not see any error in the approach that we have taken. And I note that this approach  
18 not only strictly follows the Statute and the Rules, but also internal regulations, in  
19 particular, regulation 29(1) of the regulations of the Office of the Prosecutor.

20 But more immediately for the purposes of this appeal, we also respectfully remind  
21 your Honours that this question in the end goes to the merits of the Comoros' first  
22 request for review. At this stage of the proceedings, this is water under the bridge.

23 The question for this appeal now is simply whether the Pre-Trial Chamber was  
24 entitled to set aside the Prosecutor's final decision once it was notified of it.

25 Now turning to Group D of the questions.

1 In questions A to C, your Honours enquire about the Prosecution's assessment of the  
2 complementarity requirement under Articles 53(1)(b) and 17 of the Statute.

3 And here, your Honours, I must first stress that as we made clear in our original  
4 Article 53 report, we have not yet conducted a proper complementarity assessment  
5 for this situation, and this is because such an assessment was not required in  
6 circumstances where we had reached the conclusion that there was no potential case  
7 of sufficient gravity before the Court. That is reference C2.

8 In these circumstances, and while we are of course keen to assist your Honours in this  
9 appeal, our position with regard to these questions can necessarily only be  
10 a provisional indication and without prejudice to any position that we may be called  
11 to take in the future if your Honours were to find against us.

12 But we must respectfully remind the Chamber also that the prospects of domestic  
13 proceedings, or lack thereof, is actually material to the narrow question in this appeal.

14 It is also important to recall that considerations of complementarity are not to be  
15 taken into account by the Prosecutor when considering whether a given situation  
16 contains potential cases of sufficient gravity so as to be admissible before the Court.

17 This is because Article 17(1) makes clear that the gravity analysis is entirely distinct  
18 from the complementarity analysis. Resolving the complementarity analysis  
19 positively does not eliminate the requirement to determine that there is a  
20 potential case of sufficient gravity in a given situation, or vice versa.

21 Having said this, and in the interests of completeness, we can briefly outline to your  
22 Honours our understanding, to the best of our abilities, of the current state of affairs  
23 concerning domestic proceedings with regard to the events aboard the  
24 Mavi Marmara.

25 In the Comoros we are not aware of initiation of any domestic proceedings.

1 In Palestine we are not aware of the initiation of any domestic proceedings, but then  
2 again we would not necessarily expect that there would be any since the identified  
3 crimes did not occur on Palestine territory, the alleged perpetrators do not appear to  
4 be of Palestinian nationality, and relatively few victims of the identified crimes are of  
5 Palestinian nationality. On that last point, your Honours, I refer you to reference C3.  
6 In Israel we understand that some limited investigations and prosecutions may have  
7 taken place related to the events aboard the Mavi Marmara, but this may have only  
8 been related to alleged property offences, chiefly looting cases.

9 In Turkey we understand that national proceedings were initially instituted, and  
10 some of the information made available to us was indeed coming from those  
11 proceedings. But those proceedings were terminated at the request of the domestic  
12 prosecuting authority in light of the agreement reached between Israel and Turkey  
13 concerning the Mavi Marmara incident, which we understand also makes some  
14 provision for ex gratia payment of compensation by Israel.

15 In some European states, such as Sweden and Germany, we understand that national  
16 authorities have looked into opening cases based on alleged crimes committed against  
17 their own citizens aboard the Mavi Marmara. However, we also understand that  
18 those proceedings have been closed at a relative early stage, albeit the for different  
19 reasons:

20 In Germany, according to public reports by the national prosecutors involved, there  
21 seems to have been a combination of legal criteria, namely, lack of criminal conduct,  
22 with pragmatic criteria, lack of prospects of success of investigation.

23 While in Sweden, the rationale appears to have been simply the lack of prospects of  
24 identifying the suspects involved in the crimes.

25 Finally, your Honours, in the United States, we understand that a civil action under

1 the Alien Tort Claims Act is ongoing. While this is not directly relevant to the  
2 complementarity analysis as such, my learned friend, Mr Dixon, may be --

3 THE COURT OFFICER: [14:49:06] Five minutes left.

4 MR GUARIGLIA: [14:49:08] Thank you. May be able to share more information  
5 with your Honours on that point, since I believe that he is instructed in that particular  
6 case.

7 I will turn now to your Honours' question D from Group D, which asks whether any  
8 determination by the Court not to proceed with an investigation implies a denial of  
9 justice, and a violation of the internationally recognised human right of access to  
10 justice. And respectfully, we would say no, your Honours.

11 Now, we acknowledged in our appeal brief expressly the existence and importance of  
12 Article 21(3) and the existence in international human rights law of the right to an  
13 effective remedy. That's reference C4.

14 But we also noted that the procedural aspect of that right, namely, the right of access  
15 to a court, is only directly opposable to national jurisdictions. This is not only  
16 implicit in the treaty provisions which establish the right, as described in reference C5,  
17 but also reflects the understanding of the drafters of the Statute in creating a Court  
18 with a mandate that is manifestly, and necessarily, selective, in the sense provided by  
19 Article 17. And this reflects the function of the Statute in allocating responsibility  
20 among the international community for addressing serious international crimes. It is  
21 under the Statute the primary responsibility of States, as the Preamble recognises, and  
22 this Court is vested by States with responsibility to intervene only for those situations  
23 in which potential cases would be admissible.

24 In this sense, it must be stressed that while Article 21(3) certainly mandates the  
25 interpretation of the Statute in a manner consistent with human rights law, it does not

1 support the wholesale importation of duties imposed by human rights law on states  
2 into the Court system. Much less can Article 21(3) be used as a vehicle to rewrite or  
3 delete core statutory provisions.

4 And this is precisely my second point, your Honours. It is not pursuant to a  
5 prosecutor's policy or directive that cases that may fall within the jurisdiction of the  
6 Court are nonetheless filtered out if they are not grave enough to justify action by the  
7 Court, even if this means that an investigation cannot start. It is pursuant to clear  
8 and explicit statutory provisions, Articles 17(1)(d) and 53(1)(b).

9 And in the instant situation, the Prosecutor did nothing else than to strictly apply the  
10 terms of these provisions.

11 Now, it is also important to note that even a negative determination by the Office of  
12 the Prosecutor does not close the door to victims. They always have the option to  
13 submit individual communications to the Prosecutor within the framework of  
14 Article 15(1), and the Prosecutor retains the discretion to reconsider and reopen  
15 a terminated preliminary examination under Article 53(4). And I note she has, in  
16 other situations, already demonstrated her willingness to do just this.

17 Consequently, your Honours, while victims' primary recourse is under national law,  
18 they always retain the option to communicate with the Prosecutor, and the Prosecutor  
19 always remains in a position to act on the basis of their communications in accordance  
20 with the Statute.

21 I turn now to your Honours' last question, question E from Group D, whether the  
22 Prosecutor has breached the object and purpose of the Statute by declining to open an  
23 investigation into a situation referred by a State Party.

24 And again, respectfully, your Honours, we would say no.

25 As I have just mentioned, and as also described in some of our previous filings, at

1 reference C6, the drafters of the Statute conditioned the exercise of the Court's  
2 jurisdiction on compliance with the legal conditions set out in Article 53(1) of the  
3 Statute. They did not mandate, or even allow, the Court to act beyond those  
4 conditions, no matter how concerned we may be by some of the allegations which  
5 come to our attention. Furthermore, the Statute and the Rules are plain in imposing  
6 the same substantive conditions on the opening of an investigation - those contained  
7 in Article 53(1) - no matter whether the situation is referred to the Court or whether it  
8 is a preliminary examination opened by the Prosecutor acting *proprio motu*.

9 So the Statute itself establishes a system that sets out a number of significant,  
10 mandatory and cumulative conditions prior to any investigation being opened. It's a  
11 normative architecture that aims at ensuring that only situations that truly justify  
12 action by the Court are properly opened. This should not come as a surprise,  
13 your Honours, because a common thread uniting Article 15, 17 and 53 is the desire to  
14 avert any risk of frivolous, unsupported or otherwise unjustified investigations.

15 THE COURT OFFICER: [14:54:10] Fifteen minutes are up.

16 MR GUARIGLIA: [14:54:14] I will simply wrap up, your Honours, by saying that, in  
17 our view, the object and purpose of the Statute, when properly understood, is not  
18 incompatible with the decision not to open an investigation.

19 And we will, finally, note that this is not the only instance in which we have declined  
20 to open an investigation into a referred situation. Last year, as your Honours may  
21 well be aware, we closed the Gabon preliminary examination, a situation that had  
22 been referred by the Gabon, and we note that no objection has been made to the way  
23 in which the matter was resolved there.

24 So this concludes my submissions for this phase of the hearing, your Honours.

25 Thank you.



1 PRESIDING JUDGE BOSSA: [14:54:54] Thank you, Counsel.

2 Can we now hear from the Government of Union of the Comoros; 15 minutes.

3 MR DIXON: [14:54:59] Your Honours, it is apt to return to the point that the

4 Prosecution disputes that it is bound by the Pre-Trial Chamber's interpretation of the  
5 standard of proof the way in which the Pre-Trial Chamber defined reasonable basis to  
6 initiate an investigation.

7 The Pre-Trial Chamber stated, *inter alia*, in its decision that under Article 53(1) the

8 Prosecutor need only disregard information when that information is manifestly false.

9 This holding clearly accords, we say, with the view taken by other Pre-Trial

10 Chambers and the Appeals Chamber itself. For example, in the Kenya situation, the

11 Pre-Trial Chamber found that the reasonable basis to proceed standard in Article 15

12 and 53 is the lowest evidentiary standard, which is logical given the early stage of the  
13 proceedings, that is confined to a preliminary examination and not an investigation.

14 It must be construed in accordance, the Pre-Trial Chambers have found, with the

15 underlying purpose at this stage of the proceedings, which is to prevent the Court

16 from proceedings with unwarranted, frivolous or politically motivated investigations  
17 that could have a negative effect on its credibility.

18 So that's the underlying purpose, to stop those kinds of investigations at this early

19 stage.

20 The Pre-Trial Chambers have also consistently referred to the Appeals Chamber

21 interpretation of reasonable grounds to believe under Article 58 pertaining to the

22 issuance of an arrest warrant, which is a higher standard in which the

23 Appeals Chamber has stated that the reasonable grounds to believe standard does not

24 require that the conclusion reached on the facts be the only possible or reasonable

25 one.

1 It continues, nor does it require that the Prosecutor disprove any other reasonable  
2 conclusions. Rather, it is sufficient at this stage to prove that there is a reasonable  
3 conclusion alongside others not necessarily supporting the same finding, which can  
4 be supported on the basis of the evidence and information available.

5 Nevertheless, the Prosecutor disagrees with the Pre-Trial Chamber's finding on the  
6 basis that it says that a reasonable basis has to be more than a possible, conceivable or  
7 hypothetical inference. She states that mere possibilities must be excluded.

8 Now, the Comoros disputes that that is what the Pre-Trial Chamber was in fact  
9 saying was the test. They never said that any possibility can establish a reasonable  
10 basis. And certainly nor has the Appeals Chamber said that.

11 She also goes on to say, the Prosecutor, that minor contradictions and inconsistencies  
12 can be overlooked, but ones that are so fundamental that they prevent any reasonable  
13 inference being drawn at all cannot.

14 Now, I don't think anyone has said before that if there is an inconsistency that doesn't  
15 allow any reasonable inference to be drawn, that that must nevertheless still be  
16 considered as an alternative. We are talking here about reasonable alternatives  
17 based on the evidence.

18 In light of the available information, we submit that no reasonable Prosecutor could  
19 conclude that the evidence is so fundamentally flawed or contradicted in this case  
20 that there can be no reasonable inference at all that no serious crimes were committed  
21 that require investigation. We submit that it would be farcical to suggest that an  
22 inference that the IDF operation was planned and co-ordinated and directed at  
23 civilians falls into this category of being frivolous, completely inconceivable and  
24 hypothetical.

25 To answer then the Appeals Chamber's question directly, the standard applied by the

1 Prosecutor is in reality inconsistent with the reasonable basis standard under  
2 Article 15.  
3 She hasn't interpreted and applied it properly on the facts in this case. She falls foul  
4 of that standard enshrined in both Article 15 as well as in Article 53(1).  
5 Indeed, the Pre-Trial Chamber in its second decision confirms the Chamber's decision  
6 in the first decision, the first review, saying that in the presence of several plausible  
7 explanations of the available information, the presumption - and I underline that  
8 word - the presumption of Article 53(1) in the Statute, as reflected by the use of the  
9 word "shall" in the chapeau of that article, and of the common sense, is that the  
10 Prosecutor investigates in order to be able to properly assess the relevant facts.  
11 That's the second decision of the Pre-Trial Chamber, paragraph 25. The presumption  
12 as recognised by the Pre-Trial Chamber is that the Prosecutor should investigate if  
13 there are multiple plausible explanations in order to ascertain the relevant facts.  
14 Moreover, when reading Article 53 in the context of a referral, which we have here,  
15 where the Prosecutor does not have to go to the judges for permission, she is bound to  
16 open an investigation unless there is no reasonable basis to proceed. This is the  
17 wording that I highlighted earlier; the Prosecutor shall initiate an investigation.  
18 And that wording clearly applies to referrals, because she doesn't have to come to the  
19 judges for permission.  
20 I understand this case law which says it applies to situations where she can take the  
21 initiative herself and then proceed to the judges, but she can't initiate an investigation  
22 if she doesn't have a referral. You can't say she shall initiate an investigation without  
23 coming to the Trial Chamber under the wording of Article 53.  
24 The Prosecution will of course have to consider, though, the same factors and take  
25 them into account even without a referral, as the case law has recognised. But in the

1 case of referrals, the point we emphasise is that the express terms of Article 53(1) both  
2 create a presumption in favour of investigation and mandate the Prosecutor to  
3 proceed, unless there is no reasonable basis to do so.

4 So our submission is that, in those circumstances, taking both of those factors together,  
5 if there is any doubt that should surely be interpreted in favour of the State Party who  
6 is making the referral.

7 Instead of bending over backwards to avoid that presumption, we argue that the  
8 Prosecutor should be doing the other, she should be leaning into looking to  
9 investigate a case of this nature given the evidence that is available.

10 The case law has also abundantly clarified that mere information at this stage under  
11 Article 15 and 53 is sufficient. It doesn't have to be evidence. And that the evidence  
12 need not be comprehensive or conclusive if compared to evidence which is going to  
13 be gathered later during an investigation.

14 It is for all these reasons that the Comoros submits that the Prosecutor has erred and  
15 abused their discretion in misinterpreting and misapplying the standard of proof as  
16 enshrined in both Article 53 and Article 15.

17 Coming to complementarity, this has never been fortunately a stumbling block in  
18 opening an investigation. As previously explained, the Comoros took the  
19 unprecedented step of passing national legislation so this case could be suitably  
20 pursued at the international level where it rightly belongs. No investigations have  
21 taken place in Comoros, none have taken place into the extremely serious crimes in  
22 Israel, nor in Palestine. But as the Prosecutor has indicated, it would perhaps be  
23 unlikely, given that there is no clear jurisdiction.

24 Israel has also certainly not, as has been recorded by the Pre-Trial Chamber, in any  
25 way sought to assist the Court in this situation and has effectively boycotted it.

1 In Turkey, as my learned friend points out, an agreement was signed between Turkey  
2 and Israel which effectively stopped the criminal case there.

3 Question mark about the legality of that situation, but that is fortunately not for  
4 your Honours today.

5 In return for some compensation, what had to happen was that the criminal case there  
6 had to be stopped. The victims were never consulted in their process, they had the  
7 agreement imposed upon them and certainly didn't want to accept any compensation  
8 if it meant justice couldn't be pursued. So the criminal case has been stopped in  
9 Turkey as a result of a political agreement between two States.

10 Universal jurisdiction has not --

11 THE COURT OFFICER: [15:05:05] Five minutes left.

12 MR DIXON: [15:05:07] Universal jurisdiction has not succeeded anywhere, in fact,  
13 not got off the ground. In the UK, for example, when one of the alleged perpetrators,  
14 the former minister of defence, who I mentioned earlier, travelled to London recently  
15 was reported to the Met Police, they did nothing and gave no explanation.

16 So the complementarity requirements, in our submission, have clearly been met for an  
17 investigation to be open. Of course the situation can be kept under review.

18 Turning to impunity, in the circumstances that we've been considering today, the  
19 Prosecutor's decision plainly implies, we say, a denial of justice and a violation of  
20 internationally recognised human rights, particularly to access to justice.

21 The ICC, as the court of last resort, has had its doors shut by the Prosecutor. Her  
22 actions fail, we say, to give effect to the landmark UN General Assembly Resolution  
23 60/147 of 2005, which was adopted to set out the basic principles on the international  
24 right to a remedy and reparations for victims, saying national courts, yes, as my  
25 learned friend has said, but also international courts that do provide remedies. We

1 say in this case there is recourse through following the proper provisions of the  
2 Statute.

3 In addition to that, the African Court of Human and Peoples' Rights and the  
4 European Court have also underscored that you need to have a right to a simple and  
5 effective remedy. Yes, within national jurisdictions, but they have said that this  
6 stems from a wider international right.

7 The Appeals Chamber has said that it's self-evident that the purpose of the Statute is  
8 to make internationally punishable the heinous crimes specified in the Statute. Of  
9 course, this doesn't mean, as the OTP has said, that every conceivable international  
10 crime can be prosecuted, but in this case we say that the object and purpose of the  
11 Statute has been breached because of particular factors which I have highlighted  
12 today.

13 The Comoros has been a cooperative State Party throughout. It has provided  
14 evidence to the Prosecutor. It has provided expert evidence. It has essentially  
15 produced a ready-made private prosecution, which the Prosecutor here could take on  
16 and adopt. Instead of spending all the time trying to avoid an investigation, while  
17 the Comoros has been actually investigating the case, the Prosecutor could now take  
18 on that evidence and look to get on with a full investigation.

19 It could have, in our submission, have been completed by now in all the time that we  
20 have been going backwards and forwards with endless motions and filings. You can  
21 imagine the frustration of the victims sitting on the outside. Perhaps that explains  
22 why they are exasperated, why they talk with passion about this case. It is because  
23 by now, they could have actually found out whether there was sufficient evidence to  
24 bring a prosecution, to know what the truth is, and to know whether there can be  
25 accountability and reparations.

1 Thank you, your Honours.

2 PRESIDING JUDGE BOSSA: [15:08:18] Thank you, Counsel.

3 The Legal Representative of Victims, you have ten minutes.

4 MR DIXON: [15:08:28] Thank you, your Honours. I will go straight into the short  
5 submission on behalf of the victims, which fittingly focuses on the duty to end  
6 impunity.

7 We have received extensive feedback from the victims on their deep desire to find  
8 justice and end impunity, understandably, as I have stressed, given that they have  
9 been waiting patiently since 2010, reliving their experiences each day.

10 There is no need to try and reassure them, we say, by saying, well, you can come back  
11 to the Prosecutor later and we can try and reopen it again. Why not open it now?  
12 Since we've gone through this elaborate process, the evidence is there, don't delay any  
13 longer, they say. No need to have a theoretical possibility of right in the future; give  
14 them a remedy right away.

15 There is no better advocate than hearing from the victims in their own words and  
16 they have provided us, many of which have been submitted to the Prosecutor and the  
17 Court, what their views are on impunity. And we do think it's important they those  
18 are conveyed. I will read just a few.

19 One from a victim V-203, a UK national, who said as follows: "As time has gone by  
20 it seems as if memories have faded of the outrage expressed about the attack on the  
21 flotilla by world leaders, the United Nations and the public at the time and we ask,  
22 where else if not the ICC should war crimes committed against an international group  
23 in international waters be taken when the State committing them refuses to  
24 investigate itself? Universal jurisdiction in individual countries of the victims is  
25 inconsistently available and politically vulnerable" therefore affecting our right to

1 access to justice.

2 Another victim V-278 stated: "The feeling of depression and helplessness that  
3 ensues when you realise that there a State that can behave with complete impunity  
4 and not be held to account is overwhelming ... this makes me feel worthless as  
5 a human being" and she goes on to emphasise again the need for at least an  
6 investigation into what happened.

7 Another victim said this: "When the Prosecutor continues to resist opening the case  
8 it feels like a denial of justice, because she is trying to find a way to avoid opening the  
9 case by arguing about the process rather than assessing the substance of the case. In  
10 other words, the investigation of the deaths and injuries caused by the interception of  
11 the flotilla by the Israeli [army] seem less important to the Prosecutor than her  
12 defence of her own arguments."

13 Perhaps a case amongst so many, your Honours, that captures the way in which the  
14 Prosecutor falls far short of upholding the object and purpose of the Statute, which is  
15 the primary submission that the victims have asked me to make, that it is a breach of  
16 the Statute, is that of a young man by the name of Furkan Doğan. He was an  
17 American citizen who grew up in Turkey and he was 19 when he boarded the ship,  
18 had plans to study in the US shortly after the flotilla in 2010.

19 His father has described how Furkan passionately wanted to help with the  
20 humanitarian efforts for those suffering in Gaza. His father, Professor Ahmet Doğan,  
21 is sitting in the public gallery today. Furkan was tragically killed on the top deck of  
22 the Mavi Marmara.

23 These facts have been provided to the Prosecution in great detail and are recorded in  
24 the UN documents as well.

25 He was shot a total of five times. Four of the shots struck him from behind, hitting



1 his head, back, leg and foot. Accounts from other passengers on the Mavi Marmara  
2 state that Furkan was lying wounded on the deck when a soldier stood over him and  
3 delivered the final fifth shot.

4 That is information --

5 THE COURT OFFICER: [15:13:05] Five minutes left.

6 MR DIXON: [15:13:07] -- that the Prosecution has been provided with as well.

7 Based on evidence from the forensic expert, which you have heard about today,  
8 which was submitted to the Prosecutor, it was determined that this fifth shot struck  
9 his face at point-blank range, execution style, likely while he was lying on the ground  
10 on his back.

11 According to the UN Human Rights Council report, he was not killed instantly from  
12 his wounds, but rather was lying on the deck in a conscious or semiconscious state for  
13 some time. Another situation, without being too technical, that could result in an  
14 allegation of torture before death.

15 Furkan's mother and father have tirelessly for almost ten years sought accountability  
16 and justice for the death of their son, but have had the door slammed shut in their  
17 face each step of the way. They have been to the courts in Turkey, which I have told  
18 your Honours about, both the civil and the criminal courts, and have been shut out.  
19 They have taken their case to the US, only to be refused a criminal investigation.  
20 They have explored options in Israel as well, to no avail. And similarly in the UK,  
21 they are the ones that I have described. The door has been slammed shot over and  
22 over.

23 They, like many hundreds, urge the Prosecutor not to slam shut the final door.

24 Mr Doğan has said in his witness submissions that "The victims and their families  
25 have been struggling for many years to achieve accountability for what happened,

1 only to be turned away at every stage. The ICC truly represents our last hope for  
2 justice."

3 And it's correct, yes, that there are always procedural options beyond this in the  
4 future, maybe things could be relooked at again, but given the extraordinary length of  
5 time, the steps that have been taken by people like Professor Doğan and his family,  
6 and many others, travelling around the world, trying to find the truth and closure,  
7 this is their last port of call, and that's why they say for the Prosecutor to refuse to do  
8 so breaches the clear purpose of the Statute, but doubly does so when there is such  
9 overwhelming evidence that could be investigated.

10 It might be a different case if it was extremely hard to find the evidence, but it's  
11 abundantly available. There is video material. There are endless witness accounts.  
12 There have been investigations conducted previously. There are experts who have  
13 looked at the situation, pathology reports. There is so much material. And as I  
14 have emphasised, it has already been packaged in a Prosecution case to take on. Of  
15 course it must be scrutinised very carefully, but it's there and the opportunity should  
16 not be missed one more time. This is the final chance and it must be taken.

17 Thank you, your Honours.

18 PRESIDING JUDGE BOSSA: [15:16:25] Thank you, Counsel.

19 We will now hear questions from, yes, the Office of Public Counsel for Victims, you  
20 have the floor.

21 MS MASSIDDA: [15:17:09] Thank you very much, Madam President.

22 In relation to questions in Group C, in relation to Group C questions, your Honour, I  
23 will simply associate myself entirely with the arguments presented by the Comoros,  
24 which actually were also our arguments *in toto*.

25 Therefore, I will skip Group C questions, and I will deal directly with Group D

1 questions, skipping again questions A, B and C, simply to note that already, as argued  
2 by my colleagues, there seems to be no investigation in any possible States available  
3 at this point in time and, therefore, in our submissions the requirements for engaging  
4 the jurisdiction of the Court under the statutory provisions are met.

5 I only note in this regard that my -- some of my clients are actually in the same  
6 situation as the clients of my colleague, Mr Dixon, insofar they have tried to open  
7 investigations in different states, in Germany, Sweden, Belgium, and United States,  
8 unfortunately without no result.

9 I turn now to the issues raised in question D and E of Group D, which are in fact core  
10 to the interest of the victims since they relate to the possibility of accessing and  
11 obtaining justice, knowing the truth of what happened to them and, ultimately, put  
12 an end to impunity.

13 Starting with question D, I wish to reiterate the same comments of my colleague in  
14 relation to the fact that access to justice, or the right to judicial protection, or right to  
15 an effective remedy is a well recognised human right. It is recognised in different  
16 provisions of international conventions and legal text, which I don't need to recall  
17 here to your Honours.

18 What could be of interest to recall here, in fact, is that in the jurisprudence of the  
19 Inter-American Court of Human Rights, the Court has indicated that access to justice  
20 means, and I quote:

21 "that it is not sufficient that the recourses exist formally, but they must provide results  
22 or responses to the human rights violations, in order to be considered effective. In  
23 other words, all persons must have access to a simple and rapid recourse before  
24 competent judges or courts that protect their fundamental rights. This guarantee is  
25 one of the most basic mainstays, not only of the American Convention, but also of the

1 rule of law in a democratic society in the sense set forth in the Convention." End of  
2 quote.

3 It relates to the case of *Maritza Urrutia v. Guatemala*, judgment of 27 November 2003,  
4 paragraph 117.

5 A proper and impartial criminal investigation may conclude that the crimes have  
6 been committed, that different crimes have been committed or that no crimes have  
7 been committed. However, in circumstances where an investigation into the crimes  
8 will not be undertaken neither by any domestic jurisdiction nor by the ICC, there is  
9 simply no recourse for the victims to claim relief.

10 And this, in our submission, contravenes the very object and purpose of the Rome  
11 Statute, that creates a Court in the experience that during centuries of children,  
12 women and men have been victims of unimaginable atrocities that deeply shock the  
13 conscience of humanity and that these have remained unpunished. It would  
14 constitute, in itself, a violation of the rights of victims in the form of a denial of access  
15 to justice.

16 Turning to question E, as correctly also recalled by my colleague, the Preamble of the  
17 Statute sets out --

18 THE COURT OFFICER: [15:22:08] Five minutes.

19 MS MASSIDDA: [15:22:09] -- that the object and purpose for the establishment of the  
20 Court is to put an end to impunity for the perpetrators of crimes and therefore  
21 contribute to the prevention of crimes.

22 Supportive information of the Comoros, victims trust that an investigation into the  
23 events will display an important dissuasive effect. It may in fact deter the  
24 commission of similar crimes against unarmed civilians who simply seek to alleviate  
25 the suffering of other people. If upon a fair and impartial investigation it is

1 demonstrated beyond reasonable doubt the crimes have been committed, the  
2 perpetrators and accomplices may be brought to accountability. This is what victims  
3 are waiting today.

4 And in concluding my remarks, as my learned colleague Mr Dixon did, I also would  
5 like to recall in the words of the victims what they are expecting from these  
6 proceedings.

7 I wish to recall the victims' reactions to the decision not to proceed with an  
8 investigation. Victims revealed mixed feelings of anger, disbelief and fear at the  
9 prospect they may be abandoned by the Court.

10 In their words, victim a/40018/13 said the impact of the events was massive: "ten were  
11 killed, over fifty were injured, and the number of traumatised probably runs into the  
12 hundreds." Several victims have reported being diagnosed with post-traumatic  
13 stress disorder following the attack, after seeing people killed and injured in what  
14 victims have described as a humanitarian action. Victims also said having been  
15 forced to watch others suffering and being gratuitously humiliated and find this as  
16 unbearable. Victims also indicated that the impact goes beyond the immediate  
17 effects of the crimes, and that the incidents had severe emotional and psychological  
18 consequences not only for them and their families, but also for the entire communities  
19 affected.

20 Each year, your Honours, a commemoration is held in Istanbul when tens of  
21 thousands gather in remembrance of the victims of the attack of the flotilla.

22 Victims a/40098/13 questioned: What is, counsel, the minimum number of victims  
23 that need to be killed for the Prosecution to open an investigation?

24 Victim a/05003/14 asked: If this situation is not grave, then what is the value for  
25 having a Court?

1 And finally, victim a/05010/14, said: Well, perpetrators can simply get away with  
2 their crimes just by killing their victims one by one in different days as if there was no  
3 plan behind. Meaning that in this way a systematic and widespread attack could not  
4 be proven.

5 Your Honours, victims from different countries having been affected by the events are  
6 watching these proceedings today, hoping finally that their voices will be heard and  
7 that proceedings finally start before the Court.

8 Thank you.

9 PRESIDING JUDGE BOSSA: [15:26:33] Thank you, Counsel.

10 Office of the Prosecutor, you may briefly respond if you wish; you have five minutes.

11 MR GUARIGLIA: [15:26:47] Thank you, your Honours. I will briefly respond to  
12 some of the points.

13 On the reasonable basis to believe, your Honours, Mr Dixon is absolutely right that  
14 this is the lowest standard under the Statute, this assuming that this is a shallow  
15 standard. On the contrary, it is a standard that requires, and I quote the words of  
16 late Judge Kaul, a serious, thorough and well-considered approach, as opposed to an  
17 evaluation of a summary or fragmentary nature.

18 And this is precisely what we do, your Honours, at the preliminary examination stage  
19 when assessing the standard. That's why we do not take evidence at face value.

20 That's why we undertake thorough source evaluation pursuant to standard analytical  
21 processes. That's why we evaluate the totality of the evidence. And we remain of  
22 the view, your Honours, this is the correct process, and this is the process that is  
23 consistent with the Statute.

24 Now, Mr Dixon and others may disagree with the conclusions that we reached and  
25 with the level of thoroughness that we apply in that particular evaluation process, but

1 we remain of the view that what we are doing is simply fulfilling our duties under  
2 Article 53.

3 And in the end, your Honours, there seems to a fundamental difference of views as to  
4 when you can properly open an investigation. Our position is that when you have  
5 competing versions of events on fundamental matters such that you cannot reach the  
6 reasonable basis standard, you don't open an investigation. You close a preliminary  
7 examination and you wait to see whether new facts or new evidence resolve those  
8 contradictions, and then you open an investigation.

9 The opposing view ultimately is telling the Office of the Prosecutor, you open an  
10 investigation only to determine first and foremost whether you had a proper basis to  
11 start an investigation. And with all due respect, this cannot be right. This cannot  
12 be the system that the drafters of the Statute intended.

13 If I can turn now to the point on access to justice, your Honours, the unfortunate  
14 reality of the Rome system is that many victims of serious crimes will not be able to  
15 find recourse before this Court. And if I can draw a parallel to situations of subject  
16 matter jurisdiction, there have been situations where the Office of the Prosecutor has  
17 detected the existence of extended and serious violations of human rights law that  
18 nonetheless fell short of constituting -- of reaching the threshold of crimes against  
19 humanity. In those situations, the Office of the Prosecutor had no choice but to close  
20 the preliminary examination. And I can tell you three clear examples, your Honours,  
21 Venezuela in 2006, Honduras in 2015, and Gabon in 2018.

22 Now, the victims of those human rights violations, your Honours, they didn't have  
23 a lesser right to access to justice. But surely the solution in those situations was not  
24 to broaden the Court's jurisdictional reach and to stretch beyond recognition the  
25 concept of crimes against humanity to capture that victimisation. That would have

1 been a solution contrary to the fundamental principles of the Statute.  
2 Similarly, your Honours, the solution here cannot be to water down the gravity  
3 requirement, to render it redundant or meaningless, or to upset the system of checks  
4 and balances enshrined in the Statute. It is one of those situations where we agree it  
5 is an unfortunate result. We have full sympathy for the victims. There may be  
6 recourse in other instances, in other international fora. We may be able, as I said  
7 earlier, to revisit this situation in light of new facts and new evidence, but the  
8 statutory requirements must prevail, your Honours. This Court is a court of last  
9 resort, subject to very stringent requirements, and that's the way it was created and  
10 that's the job that it has to do.

11 This concludes my submissions, your Honours.

12 PRESIDING JUDGE BOSSA: [15:30:42] Thank you, Counsel.

13 The Government of the Union of Comoros has the floor.

14 MR DIXON: [15:30:48] Your Honours, thank you.

15 I'm certainly not disputing the thoroughness of the task that the Prosecution has  
16 performed, it's rather the way in which that thoroughness has been directed, given all  
17 the work that has been done on examining all of those witness statements and all of  
18 that material, the 500 pages in which it has been analysed with annexes. My point is  
19 that you could have actually investigated the case with all that effort and energy and  
20 determined whether or not you have enough evidence to proceed to charge. What is  
21 the point of using preliminary examinations to be so thorough, to essentially say we  
22 can't go anywhere? Rather, look at a method of trying to decide much more quickly  
23 whether or not a preliminary examination should proceed to an investigation, and  
24 then use the investigation stage when you have wide-ranging powers and you can try  
25 and get further cooperation from states as well to gather that evidence to be as



1 thorough and detailed as possible. Isn't that a much better use of resources, but also  
2 a better way of reassuring the victims that you are taking their concerns and interests  
3 seriously?

4 And in this case a State Party of the ICC which has taken extraordinary steps to hand  
5 the case over, to assist the Court in bringing this case, realistically it cannot be done in  
6 the Comoros; this is the place for it to be done. And I think that circumstance, that  
7 factor must weigh into prioritising an investigation of this kind.

8 There are, of course, many situations that are not going to be able to be investigated,  
9 no one is saying that everyone can be, but when you have a case of this particular  
10 nature where there is such overwhelming evidence, where, yes, the thoroughness, a  
11 lot has been put together, when you are so close, why shut the door now is the key  
12 point that we are making.

13 In addition to that, the point that the Prosecutor makes that where you have  
14 competing evidence that is so fundamentally divergent you can't open an  
15 investigation is plainly wrong.

16 In this case, one, you don't have such evidence. Yes, you have the IDF saying we  
17 didn't do it and the victims saying we did, but that happens in every case.

18 So yes, you have got the Turkel Report saying no one used live ammunition, it was all  
19 non-lethal, it was all the fault of the resisters or the protestors, the IDF was just there  
20 trying to protect themselves.

21 And that's the position that the IDF has taken as well to some extent. Although, as I  
22 have already highlighted, look at the evidence that was given in the Turkel Report.

23 The higher-up leaders have taken a degree of responsibility, quite a lot of  
24 responsibility which could be used as a platform by the Prosecution to investigate.

25 They have gone so far as to admit making errors. They wouldn't have been offering

1 compensation to the families of the dead if they didn't think there was a reasonable  
2 evidentiary basis to do that. And yet, that has happened in order to try and resolve  
3 the civil side of the case.

4 So yes, there is that fundamental division, but that is to be expected. But amongst  
5 the victims, what they are saying is that there is no inconsistency that is so  
6 fundamental amongst their different accounts that you shouldn't investigate further.  
7 Yes, there may be some inconsistencies, there may be some question marks. They  
8 didn't all see the same thing; it was dark. There was smoke, as they've recognised,  
9 but that's not a basis to say, "Oh, well, this was all just very confusing." You can't  
10 rely on the fact that the IDF say that we didn't do it to say that brings in confusion  
11 because as the obvious alleged perpetrators, you have got to expect that as  
12 a prosecutor to arise in every case.

13 So we don't have that situation here where it is so fundamental, but arguably even it  
14 was very fundamental, if there were ways of resolving it through an investigation, we  
15 are saying that Article 53, the presumption that I was emphasising means that that  
16 must be done when it is a case that is serious enough, which we are saying it is.

17 The last thing I just wanted to highlight is that with the 15 May deadline --

18 THE COURT OFFICER: [15:35:17] Five minutes.

19 MR DIXON: [15:35:19] With the 15 May deadline -- if I could just finish this  
20 quickly -- there shouldn't be a foreshadowing of that decision. The Prosecution  
21 should be looking at this matter now in good faith and not saying, "Well, it looks like  
22 we're ultimately going come to the same decision anyway." Because the whole  
23 purpose of allowing that time to reconsider was to address the errors that the  
24 Pre-Trial Chamber had identified.

25 Thank you, your Honours.

1 PRESIDING JUDGE BOSSA: [15:35:45] Thank you, Counsel.

2 We will now hear questions from the Bench.

3 Judge Chile.

4 JUDGE EBOE-OSUJI: [15:35:59] Prosecutor, the point, Mr Guariglia, specifically, the  
5 standard you say is the lowest one, and that is the standard of reasonable basis to  
6 proceed to investigation, the Prosecutor shall, unless there is no reasonable basis to  
7 proceed, and you in articulating that, you seemed to -- Mr Dixon called you out on  
8 it later, your argument is that where there are conflicting evidence, the Prosecutor's  
9 position is not to proceed with an investigation.

10 Was that your position?

11 MR GUARIGLIA: [15:36:59] I think, your Honours, I really appreciate for your  
12 question because it allows me to perhaps clarify a bit our position.

13 Mr Dixon is, in a very creative manner, is putting us in a sort of automatism. As  
14 though we were saying every time that there are conflicting versions of events, we  
15 will basically become paralysed and we will not move forward; that --

16 JUDGE EBOE-OSUJI: [15:37:27] That seemed to be the sum of your submission,  
17 really.

18 MR GUARIGLIA: [15:37:30] Well, that was my -- that was my submission in relation  
19 to fundamental discrepancies of fact that cannot be resolved in the context of the  
20 preliminary examination and which do not allow the Prosecutor to reach the  
21 reasonable basis standard. If you look at our final decision we have devoted  
22 a number of pages as to the different type of contradictions; some minor,  
23 some peripheral, some --

24 JUDGE EBOE-OSUJI: [15:37:51] So is your position it's not quite that simple that --

25 MR GUARIGLIA: [15:37:52] It's --

1 JUDGE EBOE-OSUJI: [15:37:52] -- if there are two competing versions --

2 MR GUARIGLIA: [15:37:53] Indeed --

3 JUDGE EBOE-OSUJI: -- you don't proceed. That's not what (Overlapping speakers)

4 MR GUARIGLIA: [15:37:57] It is indeed not, your Honour, and if your Honour goes  
5 back to our Article 15 application --

6 JUDGE EBOE-OSUJI: [15:38:01] Sorry, I think we were talking at -- are you saying  
7 that is or it's not quite simply your position?

8 MR GUARIGLIA: [15:38:06] No, no, no. I was agreeing with your Honour, with  
9 your Honour. Our position is not as simple as that; it's not a formulaic position.

10 And if you go back, your Honour, to submissions that we have made for Article 15  
11 authorisation in the context of Burundi or Georgia, we have identified a number of  
12 areas where we have said these are contradictions that can only be elucidated in the  
13 context of an investigation.

14 But the position, the problem we have here is that we have fundamental  
15 competing -- and not only between the IDF and the victims, but just looking at the  
16 totality of the evidence, we -- including the own version of the victims, including the  
17 evidence -- the same evidence of Mr Dixon and the Comoros are relying on, we  
18 identify critical contradictions that do not allow us to reach the reasonable basis  
19 standard.

20 And the question becomes, what happens then? We are duty bound under the  
21 Statute to satisfy ourselves --

22 JUDGE EBOE-OSUJI: [15:38:58] Okay, let's look at this, for instance. I mean, you  
23 have, would you say in that universe of what's reasonable or not, would you consider  
24 the Hudson-Phillips report information that you can take into account one way or the  
25 other? The Hudson-Phillips report, that's the Human Rights Council commissioned

1 report led by Mr Hudson-Phillips, QC. I believe also the late Mr Desmond, I think  
2 both of them are late now --

3 MR GUARIGLIA: [15:39:28] Yes.

4 JUDGE EBOE-OSUJI: [15:39:29] -- in any event --

5 MR GUARIGLIA: [15:39:29] Yes, indeed.

6 JUDGE EBOE-OSUJI: [15:39:30] Desmond de Silva was also on that. Would that  
7 report be something that gives you information on your assessment of a reasonable  
8 basis to proceed or not to proceed?

9 MR GUARIGLIA: [15:39:49] Your Honour, that report combined with the  
10 Palmer-Uribe report, combined with any other relevant report that provides  
11 information, that has to then go through a thorough process of source evaluation, of  
12 comparison between different, different pieces of evidence and then lead to a holistic  
13 assessment of the totality of the evidence available. Now we can't start looking --

14 JUDGE EBOE-OSUJI: [15:40:07] So (Overlapping speakers)

15 MR GUARIGLIA: [15:40:07] -- we can't start looking piecemeal at one report and say  
16 we buy this report lock, stock and barrel and we completely disregard this other  
17 report because it was produced by the same State involved --

18 JUDGE EBOE-OSUJI: [15:40:21] You see, what I'm, what I'm trying to get at --

19 THE COURT OFFICER: [15:40:24] Overlapping speakers.

20 JUDGE EBOE-OSUJI: [15:40:24] -- is whether the standard you are looking at may be  
21 different at this stage versus the standard you need for a conviction. If you have all  
22 this conflicting information, would you think that it would then require you to  
23 investigate and then come to your own conclusion one way or the other as to whether  
24 or not to shut down the investigation and say, "Look, there's no charge to be brought  
25 here. We have conflicting information, we've done due diligence." Then to

1 investigate, "We have finished investigating, sorry, we don't think we have a viable  
2 case to go to trial with" --

3 MR GUARIGLIA: [15:41:07] Yes, I think --

4 JUDGE EBOE-OSUJI: [15:41:05] -- versus at --

5 MR GUARIGLIA: [15:41:06] Yes.

6 JUDGE EBOE-OSUJI: [15:41:06] -- the initial stage, saying, "There are so many  
7 conflicting information, we don't want to -- we cannot proceed."

8 MR GUARIGLIA: [15:41:19] I think, your Honour, the question, there were two, two  
9 or three points. The first one perhaps is a fundamental premise under the Statute  
10 and here, I think that probably the Comoros, the Pre-Trial Chamber and the Office of  
11 the Prosecutor have very different views as to whether an investigation can be  
12 opened, should be opened lightly or whether opening an investigation is a serious  
13 matter with serious institutional implications, implications for the States involved,  
14 implications for the same court, also in terms of resources, in terms of impact, in  
15 terms of the Court's impact with other investigations and other victims that are also  
16 seeking redress before the Court. And our position is that actually it is not a matter  
17 to be taken lightly. You need to have some evidentiary foundation in the form of  
18 information albeit before making that assessment.

19 And that's the reasonable basis standard. The reasonable basis standard requires the  
20 Prosecutor to be satisfied that the crimes appear to exist, that they fall within the  
21 jurisdiction of the Court and are they are grave enough to justify action by the Court.  
22 Now in this context, and if you look at our final decision, there were areas where we  
23 conclusively could say there is no reasonable basis because the facts don't support this.  
24 In other cases we have said was, "We cannot reach a reasonable basis; therefore, we  
25 cannot open an investigation because of the fundamental contradictions between

1 competing pieces evidence." And here our position is, we wait and see whether we  
2 will receive new evidence, new facts that allow us to resolve these contradictions and  
3 then open an investigation.

4 I think that the fundamental position here from the office is, we cannot open an  
5 investigation just so see what happens. That is not what the statute requires. That  
6 is not what we consider are allowed to do under the Statute.

7 PRESIDING JUDGE BOSSA: [15:43:14] Thank you, Judge.

8 Thank you, Counsel.

9 Judge Ibáñez.

10 JUDGE IBÁÑEZ CARRANZA: [15:43:20] Thank you for the floor. To the OTP,  
11 please, regarding the Group B questions regarding the question whether there was  
12 a policy or plan. How did the Prosecutor evaluate the logistics deployed for the  
13 attack to the vessels; including helicopters, battleships, soldiers deployed to seize the  
14 vessels and the inventory onto Israeli soil. How did you evaluate that?

15 MR STEWART: [15:43:59] Your Honour, clearly the IDF was under orders to enforce  
16 the blockade. And to enforce a blockade, there are different ways of doing it. As I  
17 understand the information in this case, there was contact with the lead ship, which I  
18 believe was the Mavi Marmara, telling them to stop. There was an invitation for  
19 them to come with the Israeli forces to offload the humanitarian cargo. All of these  
20 things were rejected by the flotilla because they had another purpose in mind.

21 So at some point, if you're going -- if you're going to have a blockade, you have to  
22 enforce it. If you don't enforce it, you don't have a blockade. And so the  
23 dispositions that you have mentioned, your Honour, would be the normal  
24 dispositions that any navy under orders to enforce a blockade would have. Now the  
25 notion, for example, that the IDF soldiers would have restraints upon them when they

1 boarded the ship makes perfect sense, if what they need to do is to take control of the  
2 crew of the ship and the people who are on board -- on board the ship. The point  
3 that we were making, and that I made earlier in my submissions, is that the  
4 dispositions to enforce the blockade do not imply a policy or plan to kill people. To  
5 kill those civilians.

6 JUDGE EBOE-OSUJI: [15:45:29] Mr Stewart --

7 JUDGE IBÁÑEZ CARRANZA: [15:45:30] (Microphone not activated)

8 JUDGE EBOE-OSUJI: [15:45:30] Sorry.

9 JUDGE IBÁÑEZ CARRANZA: [15:45:31] My mic. It's okay?

10 MR STEWART: [15:45:31] Yes.

11 JUDGE IBÁÑEZ CARRANZA: [15:45:32] So at this point, did you accept that there  
12 was a lawful blockade? That it was legal?

13 MR STEWART: [15:45:46] We took two positions. We said if it was a lawful  
14 blockade, then we examined the -- what happened on board the ships, particularly on  
15 board the Mavi Marmara. But we also said if it was an illegal blockade, what did  
16 that mean? And although my friend takes issue with the approach we took because  
17 it was the enforcement of a blockade, in this case, assuming it to be an illegal blockade,  
18 there was an attack on a civilian object which was the ship. Because that's what they  
19 wanted to stop. They wanted to stop the ship.

20 We did not see an intention to attack the people in the way in which ultimately  
21 occurred in terms of the deaths of people and the injuries that people suffered during  
22 the course of the boarding. And we don't for an instant condone any of the cruelty  
23 that was displayed to the individual passengers subsequent to the boarding.  
24 But in our examination of all of the information we had, we didn't see that as part of  
25 a plan or policy on the part of people higher up the chain of command, either military



1 or civilian.

2 JUDGE IBÁÑEZ CARRANZA: [15:47:03] Okay. Next, I move to another question,  
3 please.

4 JUDGE EBOE-OSUJI: [15:47:11] (Microphone not activated)

5 JUDGE IBÁÑEZ CARRANZA: [15:47:12] Okay, okay, okay.

6 JUDGE EBOE-OSUJI: [15:47:15] Mr Stewart, I was going to ask you this earlier.

7 Mr Dixon describes the killing of the young man --

8 MR STEWART: [15:47:22] Right.

9 JUDGE EBOE-OSUJI: [15:47:22] -- Mr Doğan, I believe he said, in the circumstances  
10 in which that occurred. Now assuming that the facts of that occurrence are not in  
11 dispute, you also look in the Hudson-Phillips report that talked about the tracking,  
12 the advance tracking of the flotilla and the certain personalities who were supposed  
13 to be on the flotilla, on the ships, including photographs taken of them and also an  
14 order to the soldiers, the IDF soldiers to the effect that the flotilla may be carrying, to  
15 put it in abbreviated terminology, suspected terrorists who may cause harm to Israeli  
16 soldiers, when you put all that together and saw what happened, does that lead you  
17 to a basis to say, okay, we may have an investigation on our hands here in relation to  
18 the killing of a young man?

19 MR STEWART: [15:48:51] Well, clearly the killing of the young man would, as  
20 described, would be inexcusable. Whether --

21 JUDGE EBOE-OSUJI: [15:49:02] But put together with the advanced surveillance  
22 information that the soldiers may encounter suspected terrorists who would do them  
23 harm.

24 MR STEWART: [15:49:16] Well, your Honour, this young man clearly was not a  
25 terrorist --

1 JUDGE EBOE-OSUJI: [15:49:21] (Microphone not activated)

2 MR STEWART: [15:49:21] No, I --

3 JUDGE EBOE-OSUJI: [15:49:21] I wasn't saying he was but --

4 MR STEWART: [15:49:23] No, I understand.

5 JUDGE EBOE-OSUJI: [15:49:23] Yes.

6 MR STEWART: [15:49:24] Let me just step out of this situation for a moment and  
7 recall a situation that occurred in Afghanistan with Canadian troops where a Taliban,  
8 who was hors de combat, was shot and killed allegedly by a Canadian soldier who  
9 was then put on trial in Canada for what he did.

10 What I'm saying is, whether or not there was information that the IDF had that there  
11 may be terrorists on board isn't connected with what appears to have happened to  
12 that young man.

13 JUDGE EBOE-OSUJI: [15:50:00] Well, the point is not really about whether or not we  
14 are dealing with a terrorist or not. The point is about advanced planning of that  
15 encounter. When you have that detail of following surveillance and the kind of  
16 information that may -- things that may happen, would you say there was not  
17 planning that should trigger the interests of the Prosecution into investigating the  
18 events? The point is about planning, not --

19 MR STEWART: [15:50:23] Right.

20 JUDGE EBOE-OSUJI: [15:50:23] -- whether you call somebody -- somebody was  
21 a terrorist or not.

22 MR STEWART: [15:50:32] Well, when one looks at war crimes, as I understand it,  
23 one of the features that we take into account by reason of the chapeau in Article 8 is  
24 whether or not the crimes described in Article 8 are committed on a massive -- or,  
25 "systematic scale" I think is the expression. I may be wrong about that, but is the

1 product of a plan or a policy and I think one has to distinguish that kind of plan or  
2 policy from what I suggest your Honour is invoking.

3 Clearly, if you are going to have a military operation of any sort, there is going to be  
4 thorough planning. And the IDF soldiers who, as we understand it, went on board  
5 the Mavi Marmara, had a variety of different kinds of weapons, including weapons  
6 that were capable of delivering lethal harm. But the fact that they also had  
7 weaponry that was non-lethal would suggest that they were prepared for different  
8 reactions. Now, certainly we are aware of information that the IDF soldiers thought  
9 they were going to be encountering peace activists and were surprised by the violence  
10 and level of resistance. I know my friend has certainly in his submissions  
11 downplayed the level of resistance, and no one is suggesting that all 500 members of  
12 the passengers who were on that ship were involved in that resistance. But there  
13 was apparently a core of very determined people who repelled the first effort that the  
14 IDF made to board the ship and, according to the information that we were  
15 evaluating, injured some IDF soldiers, captured three of them apparently.

16 So you're dealing with, I would suggest, a pretty serious confrontation and it may  
17 have got out of hand. Clearly, some of the language used in the inquiries that were  
18 conducted and clearly the admissions or acceptance that errors were made  
19 by high -- on the part of high-Israeli officials would suggest that people felt that  
20 somehow things had got out of hand.

21 But my submission to you is that the kind of planning that went into potential  
22 different contingencies, tracking of the ship and knowing where it was, efforts to get  
23 it to stop, efforts to divert it so that it could be -- the cargo could be unloaded and  
24 delivered as it ultimately was to the Gaza Strip, that kind of planning is not -- that sort  
25 of planning wouldn't be normal.

1 But that is not the sort of planning that we are talking about in my submission in this  
2 case. We are talking about planning or policy in essence to kill people and inflict  
3 serious harm on them and we just don't see that happening.

4 What occurred occurred in the context of a serious confrontation that marks off the  
5 Mavi Marmara from the other ships where this kind of thing didn't happen. And the  
6 little ship that came afterwards on 5 June, docilely was diverted to Ashdod, as I  
7 understand it, and its cargo unloaded.

8 So the reaction that we are looking at would, in my submission, whether or not it was  
9 excessively brutal, it was dictated by the circumstances as they arose and not by some  
10 kind of pre-planning or policy that maximum injury and harm was going to be  
11 inflicted on the people on board the ship. And, that's the best answer I can give you.

12 PRESIDING JUDGE BOSSA: [15:54:26] Thank you, Counsel.

13 Judge Morrison.

14 JUDGE MORRISON: [15:54:28] Mr Stewart, you talk of things getting out of hand.

15 In a military operation when things get out of hand, isn't that prima facie concern for  
16 a failure of command control?

17 MR STEWART: [15:54:44] Well, I suppose it depends on the particular operation. I  
18 believe we're talking, if I remember the facts correctly, your Honour, of a spate of  
19 a time of about 47 minutes in which a number of different things happened; including,  
20 the use of live fire which killed a number of unfortunate people and injured others.  
21 One might expect after the fact for steps to be taken if the military involved itself saw  
22 offences or crimes being committed, as happened in the case of the example I  
23 mentioned in relation to Canadian forces in Afghanistan, and there would be then  
24 a requirement on the part of the senior commanders to do something about  
25 something if it went out of hand.

1 Now the reason I've used that expression is because in the end you have information  
2 that we were looking at that suggested that in some instances brutality was used that  
3 was excessive, but whether or not that implies -- and these matters were being  
4 examined within the context of a notion of plan or policy -- whether that implies plan  
5 or policy, in my submission, is not the case.

6 JUDGE IBÁÑEZ CARRANZA: [15:56:26] Thank you.

7 Just a comment because this is a big issue, but how can you assert all of this without  
8 investigation? Without any deep investigation? It's a little bit, I mean, I think that  
9 you will need more investigation maybe to be able to assert all of this detail to  
10 questions.

11 MR STEWART: [15:56:51] You'll have to forgive me, your Honour, because although  
12 I'm familiar with the various filings and with the report, it's not me who spent the  
13 hundreds and hundreds of hours going through thousands of pages and video  
14 material and everything else in the office that's been done.

15 A very thorough preliminary examination has been conducted in this case so that the  
16 Prosecutor could determine whether or not this was the sort of case that required the  
17 intervention of the Court, and specifically, whether or not the conditions under which  
18 she has to operate in terms of the provisions in Article 53 were met.

19 So I make no apology for the assessment that we did because it was based on  
20 a thorough evaluation of the information available, including the statements of the  
21 victims, including the various reports that emanated from commissions of inquiry  
22 and all the rest of it. So I think I can speak with some confidence about the quality of  
23 the analysis that was done. It was not an investigation, you are right.

24 JUDGE IBÁÑEZ CARRANZA: [15:57:53] Okay.

25 MR STEWART: [15:57:54] But it wasn't in my submission something that we

1 engage in in every situation, at least under this Prosecutor, and it's what we're  
2 required to do, we feel.

3 JUDGE IBÁÑEZ CARRANZA: [15:58:10] It's okay. Let's move to another issue  
4 regarding what the OTP has submitted today, I would like a clarification. There is  
5 a point, does or whether the OTP thinks that in its activity of preliminary examination  
6 it is not bound by Article 21(3)? Because Article 21(3), I think it's for the organs of  
7 the Court that in the interpretation or in applying all the law of this article, one must  
8 be consistent with human rights, international law.

9 MR STEWART: [15:58:59] Mr Guariglia can --

10 JUDGE IBÁÑEZ CARRANZA: [15:58:59] A clarification --

11 MR STEWART: [15:58:59] (Overlapping speakers) -- can answer that question,  
12 your Honour.

13 JUDGE IBÁÑEZ CARRANZA: [15:58:59] Thank you.

14 MR STEWART: [15:58:59] Thank you.

15 MR GUARIGLIA: [15:59:00] Thank you so much, Judge Ibáñez, for allowing me to  
16 clarify myself, to clarify the -- my answer. No, we are -- all organs of the Court are  
17 bound by 21(3) and there is no dispute that the interpretation and application of the  
18 provisions of the Statute has to be made in a manner in accordance with  
19 internationally recognised human rights law.

20 If you look at what you have said in the -- or this Chamber has said in the Gaddafi  
21 and Al-Senussi admissibility appeal, at the same time this Court is not a human rights  
22 court. It is an international criminal court that has a critical human rights dimension  
23 and that applies in the interpretation of its own provisions in human rights law.

24 What I said during my submissions was that one cannot take the affirmative duties  
25 that human rights law poses on States and import them into the Court -- and impose

1 those duties into the Court, and this primarily in relation to the right to access to  
2 justice. This is a duty that human rights law imposes on all States. In the context of  
3 the Court, access to justice is subordinate to the specific statutory requirements that  
4 allow victims to have access to the court system. It's not unfettered access to justice.  
5 So in the sense just to give you a couple of examples under your own jurisprudence,  
6 victims may not participate in the OTP's investigation. Victims may participate in  
7 proceedings, but only in a manner regulated by the Statute. They may not lead  
8 evidence autonomously. They have to ask the Trial Chamber to call that evidence on  
9 their behalf.

10 So everything in that sense is regulated by the Statute. My point was simply that the  
11 right to access to the Court cannot be construed in such a manner to delete the very  
12 stringent statutory requirements for the opening of an investigation, and that was the  
13 point that I tried to make with my parallel on subject matter jurisdiction and crimes  
14 against humanity. We cannot, in order to accommodate those victims of serious  
15 violations of human rights law that fall short of the threshold of crimes against  
16 humanity, overstretch the concept of crimes against humanity to embrace their  
17 victimisation. And here we cannot water down and dilute the concept of gravity,  
18 which is a critical statutory requirement. It's not an afterthought in the Statute. It is  
19 a central concept in admissibility.

20 We cannot water it down in order to accommodate victims that have been wronged,  
21 that have suffered and they have a right to a remedy, but this Court cannot provide  
22 that remedy in this particular context.

23 So that was my point, your Honours.

24 JUDGE IBÁÑEZ CARRANZA: [16:01:47] A final question, please. Well, I think all  
25 of us here are aware that the treaties must be interpreted in light of the purpose and

1 object of the treaty, that in this case is in the preamble of the Rome Statute;  
2 accordingly, the Vienna Convention.  
3 So do you think that this interpretation that you have made of Article 21(3) and, of  
4 course, the decision that you have made in this case is in compliance with the purpose  
5 and object of the Rome Statute? About putting an end to impunity? And, by this  
6 way, preventing future -- the commission of future crimes?

7 MR GUARIGLIA: [16:02:31] Your Honour, the Court is an instrument to contribute  
8 to the eradication of impunity. It is not a super court that can, in and of itself,  
9 eradicate impunity.

10 And the Statute is created in that manner. The requirement of gravity, for instance,  
11 is an additional layer -- is an additional filter that has to be complied with before an  
12 investigation starts. Otherwise, the drafters of the Statute would have said  
13 jurisdiction, subject matter jurisdiction equates gravity, so once you verify that crimes  
14 under jurisdiction of the Court have occurred, there is no need to engage in any  
15 supplementary enquiry, you just open an investigation. But that's not the system.  
16 The system is a system where you first verify that crimes within the jurisdiction of the  
17 Court have occurred and then you make a subsequent determination whether within  
18 that universe of crimes those particular crimes are grave enough to justify action by  
19 the Court, which means that there will be a number of instances where crimes under  
20 the Statute will not be addressed by this Court.

21 And that is the logic of the principle of complementarity as well, they have to be  
22 addressed by States because States retain primary jurisdiction and duty over the  
23 international crimes. That is the distribution of labour between the ICC and national  
24 jurisdictions, and that is the object and purpose of the Statute.

25 So in that context, your Honours, no, I don't see any incompatibility. On the



1 contrary, I think we are interpreting the Statute and the Rome system the way was  
2 supposed to work.

3 JUDGE IBÁÑEZ CARRANZA: [16:04:06] I'm sorry --

4 PRESIDING JUDGE BOSSA: [16:04:09] We have to move on because we have to  
5 close by quarter to five.

6 JUDGE IBÁÑEZ CARRANZA: [16:04:15] It's the last, it's the last clarification, please.

7 So do you think that the interpretation of human rights obligations that are in  
8 Article 21(3) can be in contradiction with the report of human rights adopted by  
9 United Nations Human Rights Council, is it possible?

10 MR GUARIGLIA: [16:04:44] If I understand your Honour's question correctly, I  
11 think that the implication is if we assess a report by the Human Rights Council and  
12 we analyse that report against a number of other pieces evidence and reach  
13 a conclusion that is not necessarily consistent with that report, whether we will be  
14 disregarding Article 21(3), and I will respectfully submit there is no contradiction  
15 there, one thing is how do we interpret and apply provisions of the Statute in light of  
16 human rights law? A different thing is how do we conduct our independent duties  
17 of analysis and inquiry in a context like this?

18 I think we would be in violation of the Statute if we did the opposite. If we took at  
19 face value a report put together by a certain body without analysing its methodology,  
20 the underlying material, its consistency with other reports and other items of  
21 evidence, actually, what we have done is done. What the Office of the Prosecutor is  
22 supposed to do under the Statute and the Rules, which is conduct a full assessment,  
23 not only of the UN Human Rights Council report, but also of the Uribe Palmer report,  
24 but also of the decisions made in Germany where the Prosecutor decided that there  
25 was no criminal conduct and closed the investigation, in relation to the statements

1 provided by the victims, other material that we could gather, and we assessed the  
2 whole evidence comprehensively in the sense, your Honour, I will -- and I'm  
3 complementing, supplementing what my colleague Mr Stewart was saying, our final  
4 decision, our previous report is probably the most comprehensive analysis of the  
5 totality of the available material in relation to this particular incident.

6 JUDGE IBÁÑEZ CARRANZA: [16:06:32] Okay. Thank you.

7 PRESIDING JUDGE BOSSA: [16:06:34] Thank you, Judge.

8 One last question from Judge Eboe-Osuji.

9 JUDGE EBOE-OSUJI: [16:06:39] To Mr Dixon this time.

10 PRESIDING JUDGE BOSSA: [16:06:40] And, Mr Dixon, be brief in your answers,  
11 please.

12 MR DIXON: [16:06:42] Yes, I will, your Honour.

13 JUDGE EBOE-OSUJI: [16:06:43] Mr Dixon, I'm sure you understood the point of my  
14 question to Mr Stewart was not at all to suggest that the clients you represent was in  
15 the category, that kind of description, it was rather whether advanced surveillance  
16 and preparation might have put people in certain fear of who  
17 they might -- a mistaken fear of who they might encounter on the ship. That was the  
18 point of that.

19 You can speak to it if you like, but my question to you rather is on the significance we  
20 must put on this document the OTP produced titled "Final Decision of the Prosecutor"  
21 dated 29 November 2017, 144-page document, what is it doing? What is it doing?  
22 Is it telling us that the OTP may in fact have been responding to the direction of the  
23 Pre-Trial Chamber, or is the OTP doing something different with this document?

24 MR DIXON: [16:07:50] Your Honour, our submission is that the OTP is doing  
25 something completely different. They have not -- as the Pre-Trial Chamber said,

1 they have not identified each of the errors and set about in detail addressing the  
2 errors that they were meant to focus on. They have in fact said "we're not going to  
3 do that". It is as blatant as that. It's standing up and, however you sugarcoat it,  
4 saying, "We are not going to do it. We're drawing the line here. And what we will  
5 do out of a general discretion and because we don't want to be seen to be completely  
6 unreasonable, what we are doing is we are going to look at the new material you have  
7 given us". And our submission is that all they have done in looking at that new  
8 material, in looking at the arguments that were raised is polish the errors, they have  
9 looked at making absolutely sure -- and we see it now again with Mr Stewart's  
10 answer, I mean he has hook, line and sinker set out the position of Turkel. That's the  
11 position of the IDF that "We were entitled to go in and stop the ships, this is lawful  
12 action, and some things went wrong, and we're sorry about that, some things went  
13 wrong on board, but really, the blame should be squarely laid on those people who  
14 had some arms who were trying to resist us".  
15 And that's the position that the UN in two reports said it was not correct. They  
16 looked at the evidence and said no, if there's firing from helicopters, that completely  
17 contradicts that. Or as Palmer said, well, give us an explanation. And they weren't  
18 satisfied with that explanation, ultimately the Turkel explanation did not satisfy  
19 Palmer.  
20 And it cannot be right, and this is what the Pre-Trial Chamber said all along, that you  
21 take one report and ignore the others, without determining what is the correct  
22 position at this stage, which you've got to go through the steps lawfully and assess all  
23 of the evidence, and the only way to do that ultimately is through an investigation.  
24 Now if you had no UN reports, it might be different, or no other evidence, but that's  
25 not the case here. You've got compelling evidence that establishes a reasonable basis

1 to believe that there were very serious war crimes committed.  
2 So what our fundamental position is, is what has been done in that decision is to  
3 deliberately avoid addressing the errors and then where -- of course there is some  
4 overlap with addressing the issues, but to make sure that there is no possible way that  
5 this case could ever be investigated and in doing so committed the same errors and  
6 new errors, overlooking -- I have cited so much evidence, very important evidence  
7 about direct attacks on civilians. None of that has been given any prominence  
8 whatsoever. Instead, the focus has been on saying, "Well, they could be confused",  
9 or picked out bits that support ultimately the Turkel position, as I have outlined.  
10 I hope the answer wasn't too long, Madam President, but I did want to clarify that  
11 matter. It's very important.

12 PRESIDING JUDGE BOSSA: [16:10:52] All right. We now come to the closing  
13 observations of the parties. I'm afraid that ten minutes will not be available to each  
14 of you because of the prolonged nature of the questions from the Bench and the  
15 answers from you.

16 So we are left with a few minutes, so let's give each one seven minutes, seven minutes  
17 and that is all.

18 So we are starting with the Legal Representative of the victims, seven minutes.

19 MR DIXON: [16:11:33] (Microphone not activated) because I think we  
20 have exhausted the issues. Just a small collection of points to highlight.

21 Firstly, that the victims do wish to emphasise a point that the Pre-Trial Chamber  
22 picked up on how unnecessarily long the preliminary examination has been in  
23 frustrating their rights to know whether or not there is going to be an investigation  
24 because that ultimately affects whether they are going to have access to justice and  
25 reparations thereafter.

1 And, therefore, they do implore the Appeals Chamber to look to hold the Prosecution  
2 to the 15 May deadline, but the concern that the victims expressed, and we have seen  
3 it over and over again today, is that the Prosecutor is not even saying the views they  
4 are expressing now are preliminary because, in fact, they are reconsidering as we  
5 speak. They are saying, "That's our view". And, therefore, the potential, I wish it  
6 were different, but the potential for them genuinely addressing the errors is very slim.  
7 And however they will dip it in honey and say, "Actually, we're not doing that", what  
8 they are really saying is "No, we are not going to change our mind. Don't think that  
9 you can make us do that."

10 And that's what the victims have said in their submissions earlier, it is very important,  
11 that a line has to be drawn here and sanctions have to be considered because unless  
12 there are consequences, this standoff is not going to get anywhere, because ultimately,  
13 unfortunately, very unfortunately, that's what it's becoming. The Prosecution hasn't  
14 today at any stage, not once indicated that "we are reconsidering now and everything  
15 we say now is subject to that". They have stuck with their position and they have  
16 reiterated even in some ways giving evidence from the bar table about how they say  
17 the attack took place, that is was really all the fault of the victims, not the IDF and  
18 that's it. They're not going to change their view, unless they are prepared now in  
19 front of your Honours to say, "No, we are, we are considering. We've got two weeks  
20 to do it and we are doing it genuinely".

21 Because if they are not, the victims maintain that they are in noncompliance with the  
22 order of the Pre-Trial Chamber. If that is not enforced, it will happen again and  
23 again and again, and not only in this situation, but in others. And, therefore, it is  
24 vital that the bull is taken by the horns, as it were, and that the Prosecution is held to  
25 the order, as any State would be, as any other party would be, as the Comoros would

1 be if they failed to comply with a request, they have to be held to it, held in  
2 noncompliance and there have to be consequences so that a line is drawn and this  
3 does not happen again.

4 That's what the victims wish to emphasise as a very sober and firm closing  
5 submission.

6 Thank you, your Honours, for the opportunity.

7 PRESIDING JUDGE BOSSA: [16:14:28] Thank you, Counsel.

8 Can we now hear from the Office of Public Counsel for Victims, seven minutes.

9 MS MASSIDDA: [16:14:37] Thank you, Madam President.

10 The only last concern that the victims we represent want to put before the  
11 Appeals Chamber is also for us, the passing of time. There has been a constant  
12 request from our client of why it's taking so long, why this preliminary examination is  
13 unnecessarily, to reiterate the word used by my colleague, unnecessarily long.  
14 We have provided all information, we have supplemented evidence, we have tried to  
15 even find even more information, and still this is not enough. What we should do  
16 more in order to advance these proceedings and to try to access justice? This is the  
17 concern.

18 And we also agree with my colleague in relation to the fact that the noncompliance  
19 should stop. Victims considered that the Prosecution is in noncompliance with the  
20 Pre-Trial Chamber's instructions and that the Prosecution should be required to  
21 comply. And this is actually their main concerns at this point in time.

22 Thank you very much.

23 PRESIDING JUDGE BOSSA: [16:15:51] Thank you, Counsel, and for being brief.

24 The government of the Union of the Comoros.

25 MR DIXON: [16:15:58] Thank you, your Honours. There is an important finding of

1 the Appeals Chamber that we did want to highlight in our closing submissions so that  
2 it's not lost. And it's actually cited in the OTP's policy paper on preliminary  
3 examinations at paragraph 60 where it states: "The Appeals Chamber has dismissed  
4 the setting of an overly restrictive legal bar to the interpretation of gravity that would  
5 hamper the deterrent role of the Court. It has also observed that the role of persons  
6 or groups may vary considerably depending on the circumstances of the case and  
7 therefore should not be exclusively assessed or predetermined on excessively  
8 formulistic grounds."  
9 That's the situation in the Democratic Republic of the Congo decision of 13 July 2006.  
10 I highlight this because it is a finding of the Appeals Chamber and it touches on two  
11 very important points. Firstly, that the interpretation of gravity should not hamper  
12 the deterrent role of the Court. We should not be looking here to always find ways  
13 of making the gravity threshold so difficult to obtain or complicated to the point that  
14 it becomes worthless.  
15 Yes, of course, the Court has to satisfy itself that crimes have been committed within  
16 the jurisdiction, complementarity is vital, but this important dicta highlights that the  
17 deterrent role of the Court must be taken into account and balanced against any  
18 finding on gravity and I will urge your Honours to do that in this case. The result of  
19 not taking the matter further would have, we say, catastrophic consequences for that  
20 deterrent aspect, that as long as you don't cooperate with the Court, and in this case  
21 have a case that's been strung out for so many years arguing about many  
22 technicalities perhaps is the right way to describe it, instead of getting into the  
23 substance of the case, means that in the end you can get away with it.  
24 On arguments around gravity which, your Honours, let's face it, are very nebulous,  
25 they're hard to put your finger on. It's quite easy to argue the nature and

1 circumstances and impacts of crimes in so many different ways. As the Prosecutor  
2 you have a very wide berth to say which cases you are going to pick and choose if  
3 you use gravity as the sole determining factor, which it is in this case. So I would  
4 urge attention be drawn to that aspect, but also to the aspect of not looking at it in  
5 excessively formalistic grounds. Yes, of course, we have to go through a number of  
6 factors, your Honours, which we've done, but trying to look at it overall, to look at the  
7 length of time the case has taken, all the steps and stages we have been through, the  
8 amount of evidence, and what has been put in by the Comoros as well in trying to  
9 build up the evidence in the case are all overall factors to take into account to see this  
10 as a priority in investigation. And not to stick too rigidly, as we say the Prosecution  
11 has done too often, to try and shut each of the little gaps that you could get through.  
12 We say, in fact, that the spaces to move into a Prosecution are wide open. It should  
13 be, in our submission, straightforward and it is baffling to still be in the situation  
14 today where we are arguing just taking that first baby step. As I have said before,  
15 this is not about determining whether charges should be brought or looking at, as  
16 your Honours have pointed out, there is a case that can secure a conviction, it's the  
17 first stage that we are looking to clear. That is an important decision to take into  
18 account. Your Honours, in addition to that, the fact that we are very close to when  
19 we should have a new reconsideration decision is also a matter of concern to the  
20 Government of the Comoros. Mr Stewart raised earlier on the issue of self-defence,  
21 whether the IDF were perhaps justified in taking those actions or could be justified in  
22 taking those actions, not that that would mean the crimes didn't happen, but it would  
23 diminish the gravity of the situation. Now that was the matter that the Prosecutor  
24 specifically said right at the outset it wasn't going to take into account, you leave  
25 self-defence until later, until you have conducted an investigation. But now they are



1 bringing it back into the equation again, constantly looking at ways of saying that  
2 there isn't enough, we have too many difficulties here to get this off the ground.  
3 That is something that, certainly, issues of self-defence, on both sides, can be left to  
4 the investigation. It's impossible to determine those issues now, only a reasonable  
5 basis to initiate is what is required.

6 I do also want to, on this point, highlight the evidence of one final victim, V-268, in  
7 response to what the Prosecution is saying that, well, you know, maybe there were  
8 just mistakes made, things, things went wrong. I mean, this was a person who was  
9 shot in the head on the top deck. He is somebody who I've met and it's a miracle  
10 that he is still alive. But he describes how he was lying there with soldiers walking  
11 around him saying, "Leave him, he's dying." He is man who could understand  
12 Hebrew, and that's why he could give us evidence. This is evidence that the  
13 Prosecution has been given. And when the soldiers returned to him later he recalls  
14 one of them saying, "The son of a whore is still alive." And then he just left him  
15 lying there again with this gaping head wound and he states that he saw laser sights  
16 coming down from the helicopter and that he saw many people falling and being  
17 wounded. And instead of looking at this as a horrific account, given the things that  
18 were said as well, no prominence was given to this evidence. The Prosecution  
19 instead said, well, even if he saw laser lights aiming down, that doesn't mean --

20 THE COURT OFFICER: [16:23:16] Time is up.

21 MR DIXON: [16:23:21] -- those weapons were actually being shot. That that is the  
22 way they said he should be treated with caution. And I simply end on that point to  
23 show this is completely inconsistent with soldiers making mistakes; it's cruel, callous  
24 killing, and the Prosecution should give that proper recognition, and if they did they  
25 would open an investigation, which they should do now.

1 Thank you, your Honours, for the opportunity.

2 PRESIDING JUDGE BOSSA: [16:23:47] Thank you.

3 Have we heard from the Prosecutor? We should have heard from you first.

4 MR STEWART: [16:23:54] Madam President, your Honours, thank you for  
5 convening this hearing.

6 The issues raised in this appeal by the Prosecutor are vital to the discharge of her  
7 mandate and, we submit, of constitutional importance for the Court.

8 It is also vital for everyone involved with the Court, including victims, States, and the  
9 Prosecutor herself, to have legal certainty and predictability in the interpretation and  
10 application of the Rome Statute and Rules.

11 No one should doubt the Prosecutor's resolution in discharging her responsibilities,  
12 even to confront the powerful. She may be deliberate, she may be thorough, but she  
13 will do what the Statute commands.

14 We did in this case take into account the callous killing that my friend has referred to,  
15 because we found that there were reasonable grounds to believe that Rome Statute  
16 crimes had indeed been committed. And yet, the analysis that we conducted  
17 ultimately turned on the issue of gravity.

18 Now, the drafters of the Rome Statute recognised that the conditions required for an  
19 investigation to be opened at this Court are crucial to its operation, and these  
20 conditions were a matter of direct concern to States in deciding whether to ratify the  
21 Statute. The Statute places the ICC Prosecutor at the heart of the determination  
22 whether to initiate an investigation.

23 As Judge Shahabudden said when writing about the ICTY, the Prosecutor is the  
24 engine of an international tribunal. And I refer you to our reference list X1.

25 She has the sole responsibility for conducting investigations and initiating

1 prosecutions. And on this basis the drafters decided that she must also be granted  
2 a unique role in assessing when investigations may be opened, according to the legal  
3 criteria laid down in the Statute. They made it indispensable that the Prosecutor first  
4 be satisfied that the conditions in Articles 53(1)(a) and 53(1)(b) are met.

5 In other words, she has to be satisfied that the conditions of jurisdiction and  
6 admissibility, respectively, are met before she can find that a reasonable basis to  
7 initiate an investigation exists. And understanding this fundamental point is  
8 essential to the determination of this appeal.

9 In a real sense, the Office of the Prosecutor is the gatekeeper of the whole system.  
10 It's a critical role and it entails enormous responsibility, and it may explain why we  
11 tend to be conservative in our approach to both the jurisdictional and admissibility  
12 requirements of the Statute.

13 We approached a crucial element of admissibility, namely, gravity, in a careful,  
14 thorough and reasoned manner, and came to the conclusion that this case, despite the  
15 controversies and the tragic loss of life did not have sufficient gravity to warrant the  
16 Court's intervention, and conducting such an assessment is dictated by the Statute, by  
17 the provisions that we have referred to.

18 And nothing in our approach. I wish to stress, evinces a lack of concern for the  
19 victims or the condonation of any alleged crimes.

20 All of us in this courtroom, I venture to say, are concerned to enhance access to justice  
21 for the most serious international crimes. However, the Prosecutor has to comport  
22 herself as a minister of justice, and this means, among other considerations, that what  
23 may be our natural desire as prosecutors to see justice done in a particular situation  
24 must be tempered by our duty to act according to the law.

25 Even if the Prosecutor considers there is a reasonable basis to believe that crimes

1 within the jurisdiction of the Court were committed, the Statute requires her, in  
2 carrying out her duties under Article 53(1), to determine whether there is at least one  
3 potential case in a situation which is sufficiently grave to justify opening an  
4 investigation.

5 This legal requirement was expressly and deliberately imposed by the drafters, and  
6 we have to comply with it, and we have tried to do so in good faith, including by  
7 reconsidering our original decision as the Pre-Trial Chamber requested us to do.

8 So the questions that we sought certification about and which were certified, for your  
9 decision, are these:

10 For situations referred to the Prosecutor, did the drafters of the Statute intend to make  
11 the Pre-Trial Chamber, in addition to ensuring that the Prosecutor exercised her  
12 discretion properly, competent to require the Prosecutor to adopt its own reasoning  
13 and conclusions under Article 53(3)(a), and thus bind her to a predetermined  
14 outcome?

15 Did the drafters, for any reason, intend to give the Pre-Trial Chamber the power to set  
16 aside the Prosecutor's final decision, once it was formally notified according to Rule  
17 108(3)?

18 For the reasons given in our brief, and addressed in our submissions today, we  
19 submit that the answer to both questions should be no.

20 It's the only answer consistent with the plain text of the Statute, its context, object and  
21 purpose, which establish distinct powers and obligations for the Pre-Trial Chamber  
22 and the Prosecutor under Article 53.

23 It's the only answer that preserves the distinction between the procedures provided  
24 for in Article 53(3)(a) and Article 53(3)(b).

25 It's the only answer which recognises the interest in reasonable finality of the

1 decisions, a concept to which the drafters gave effect by making a decision under  
2 Rule 108(3) a final decision. Madam President, your Honours, you have heard  
3 a wide ranging number of arguments in response to the questions that were asked,  
4 that really go far beyond what was certified in this appeal for decision, and if you  
5 would find it helpful or useful we would be prepared to file additional submissions in  
6 writing to address a number of those issues.

7 Madam President, your Honours, if you agree with our submissions as to the correct  
8 interpretation --

9 THE COURT OFFICER: [16:30:47] Time is up.

10 MR STEWART: [16:30:49] -- of Article 53 and Rule 108, as well as our understanding  
11 of the previous decision of this Appeals Chamber, then we would respectfully ask  
12 that you reverse the Pre-Trial Chamber's decision, and exercise your own power  
13 under Article 83(2)(a) to dismiss *in limine* the second application for review made by  
14 the Comoros.

15 Thank you.

16 PRESIDING JUDGE BOSSA: [16:31:15] Thank you, Counsel.

17 This marks the end of this hearing for today.

18 On behalf of the Appeals Chamber I wish to thank everyone, especially counsel, court  
19 officers, interpreters, reporters, technicians, security personnel, judges, and the legal  
20 team from Chambers. Thank you for assisting to make this hearing possible, and we  
21 wish you a nice evening.

22 You will hear from us in due course about the date of delivery of judgment.

23 The hearing has come to an end.

24 THE COURT USHER: [16:32:00] All rise.

25 (The hearing ends in open session at 4.32 p.m.)