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PRE-TRIAL CHAMBER I

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

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

Public *with* Public Annex

**Public Redacted Version of Prosecution's Consolidated Response to the
Observations of the Victims
(ICC-01/13-27 and ICC-01/13-28)**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. In all aspects of its work, the Office of the Prosecutor takes into account the interests of victims.¹

2. As reiterated in its previous response,² as well as in its original report,³ the Prosecution has found a reasonable basis to believe that war crimes were committed by some Israel Defence Forces (“IDF”) troops during and after the boarding of the *Mavi Marmara* on 30 May 2010. These alleged crimes should be investigated and, if well founded, prosecuted.⁴

3. But the issue in these review proceedings under article 53(3) of the Statute is not whether crimes were committed, or the indignation that such crimes may rightly engender. The issue is whether the gravity of this situation makes this Court the proper forum.

4. The Prosecution sought, and seeks, to explain its gravity analysis transparently and candidly. That analysis was framed by the legal rules and principles within which this Court operates, and based on an independent, fair and objective scrutiny of the information in the Prosecution’s possession. That analysis may not necessarily yield the result sincerely urged by victims or States. But the result does not necessarily invalidate the process, or tarnish its integrity. Moreover, these review proceedings provide a further safeguard, both of process and result.

5. The observations by the victims’ legal representatives show no error in the report.⁵ This response distinguishes between the legal and evidentiary submissions

¹ See e.g. OTP, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para.5 (“The Office has committed to [...] adopting a victim-responsive approach in its work”).

² ICC-01/13-14-Red (“Response”).

³ ICC-01/13-6-AnxA (“Report”).

⁴ See Response, paras.2, 4; Report, paras.132, 134, 149.

⁵ See ICC-01/13-27-Conf (“OPCV Observations”); ICC-01/13-28-Conf (“Counsel Observations”).

presented—with which the Prosecution disagrees—and the personal expressions of the victims’ perceptions and feelings, which nonetheless deserve the greatest respect.⁶

Confidentiality and procedural matters

6. The OPCV Observations and Counsel Observations were filed confidentially. The OPCV Observations contain additional arguments not made by the Government of the Union of the Comoros in its original application.⁷ The Counsel Observations, filed by Mr Nice and Mr Dixon, supplement arguments made by the Comoros. These submissions, together, total 98 pages.

7. As foreshadowed, consistent with rule 91(2) of the Rules of Procedure and Evidence and regulation 24(1) of the Regulations of the Court (“Regulations”), the Prosecution considers that it is entitled to respond to these submissions.⁸

8. In the interest of judicial economy, the Prosecution responds to the victims’ observations on a consolidated basis.

9. By analogy with regulation 38(1)(d), and the Pre-Trial Chamber’s decision authorising the Response not exceeding 100 pages,⁹ the Prosecution considers that its response may be at a length not exceeding 100 pages.¹⁰ To any extent the Pre-Trial Chamber deems regulation 37(1) to apply, however, the Prosecution seeks the

⁶ In case clarification of its position regarding victim participation in this situation is required, the Prosecution recalls that it did not oppose victim participation, but only requested the Pre-Trial Chamber to consider how victims might best be defined in the particular context of this situation. The Prosecution stated unambiguously: “[t]he Pre-Trial Chamber *should* receive the views of relevant victims, being persons aboard the *Mavi Marmara*, or persons otherwise harmed by those events.” See ICC-01/13-8, para.19 (emphasis added). The Prosecution further expressly stated that it was not able to take a “position regarding persons aboard the *Sofia*”, a matter which it left to the Pre-Trial Chamber. See *further* paras.10-12 (noting that the Report only made a conditional determination concerning any crime committed aboard the *Sofia*, and that no determination was made of a reasonable basis to believe that crimes were committed aboard the *Rachel Corrie*). Cf. OPCV Observations, para.30.

⁷ See ICC-01/13-3-Conf (“Request”).

⁸ See ICC-01/13-20, para.4.

⁹ See ICC-01/13-5, para.6.

¹⁰ See *further* ICC-01/13-18 (authorising the victims to file submissions, and setting no page limit).

necessary extension of the page limit in the interest of procedural equality between the Parties and participants. It further seeks any necessary authorisation to exceed the average number of words per page, governed by regulation 36(3).¹¹

10. Applying regulation 23*bis*(2), this response is filed confidentially. The Prosecution simultaneously files a public redacted version.

Submissions

11. The Prosecution maintains the general position set out in the Report and its Response.

12. Like the Comoros, the victims' representatives tend to confuse the situation aboard the three vessels within the Court's jurisdiction (the *Mavi Marmara*, the *Eleftheri Mesogios* or *Sofia*, and the *Rachel Corrie*: the "Three Vessels") with the situation in Gaza. Nothing supports such an approach. The question of possible crimes committed in Palestine (including Gaza) is the subject of a separate preliminary examination, within the scope of the distinct temporal jurisdiction conferred upon the Court.¹²

13. In conducting its preliminary examination in this situation, the Prosecution correctly applied the legal standard set by article 53 of the Statute. It considered all the information in its possession, and assigned relevant materials appropriate weight. It properly analysed all relevant factors to assess the gravity of any potential case(s) arising from the situation. Each of these points will be addressed in turn.

14. Since the Counsel Observations are largely consistent in their legal approach with the submissions of the Comoros, this response initially addresses the novel

¹¹ This response is approximately 24,397 words, at an average nearing 326 words per page. This represents no more than approximately 80% of the 30,000 words available from the 100-page limit.

¹² See Response, paras.1, 10.

legal and factual arguments raised by the OPCV, and places them in the context of the litigation so far. The response concludes by considering the significance of the specific representations of the victims themselves, conveyed both by the OPCV and, in detail, by independent counsel. Although the Counsel Observations present in this respect some new details unknown to the Prosecution, neither the Counsel Observations nor OPCV Observations show any material facts or allegations which were not previously taken into account in the preliminary examination.

The Pre-Trial Chamber should apply a deferential standard of review

15. Both the Prosecution and the Comoros agree that the Pre-Trial Chamber should adopt a deferential standard of review in considering the Report—although differences remain as to the definition of that standard.¹³ As the Comoros submitted, the question is not whether the Pre-Trial Chamber agrees with the Prosecution’s analysis, but whether it was erroneous.¹⁴ The Prosecution and the Comoros also agree that any error must be shown to materially affect the Report.¹⁵

16. The OPCV Observations suggest that the proper standard of review is “whether an impartial and objective observer in the same position as the Prosecutor (*i.e.*, with access to the same information) would have reasonably reached the same conclusion.”¹⁶

17. The Prosecution agrees that the Pre-Trial Chamber must conduct its analysis on the basis of the information available to the Prosecution at the time it completed the Report. Likewise, although the origin of the OPCV’s precise formulation of the

¹³ See Request, paras.48-59; Response, paras.13-16; ICC-01/13-15, paras.4, 18-20; ICC-01/13-17 (“Response to Request to Reply”), para.19.

¹⁴ Request, para.52 (quoting ICC-02/04-01/05-408 OA3, para.81: “the question is not whether the Appeals Chamber agrees with the Trial Chamber’s conclusion, but rather ‘whether the Trial Chamber has correctly exercised its discretion in reaching that decision’”).

¹⁵ See Request, para.56; Response, para.16.

¹⁶ OPCV Observations, para.24 (citing ECtHR, *Weeks v. United Kingdom*, Application No.9787/82, Judgment (Plenary), 2 March 1987, para.69; *Fayed v. United Kingdom*, Application No.17101/90, Judgment, 21 September 1990, paras.44-45).

reasonableness standard is unclear, the Prosecution understands it to be essentially consistent with its own view¹⁷—the Pre-Trial Chamber should adopt the standard of a judicial body reviewing a decision by a governmental body, intervening only if the Prosecution:

- breached the law, or a principle of natural justice, or was unfair;
- took into account irrelevant material or failed to take account of relevant material; or
- reached a factual conclusion which was so unreasonable that no reasonable person could have reached it.¹⁸

18. Although the Counsel Observations do not directly address the appropriate standard of review, their assertion that the Report is “so unreasonable that the Prosecutor must be directed to reconsider it and apply the correct legal standard” would also seem consistent with this analysis.¹⁹

The correct standard of proof was applied

19. Article 53 of the Statute clearly sets out the standard of proof to be applied by the Prosecution in conducting a preliminary examination. The victims’ legal

¹⁷ See also OPCV Observations, para.25 (the Pre-Trial Chamber should analyse “whether the Prosecutor evaluated the information available to her in an impartial and objective manner” and “whether the decision not to open the investigation was reasonable”).

¹⁸ See Response, paras.14-15 (citing *inter alia* ICC-Pres-RoC72-02-05, para.16; ICC-01/05-01/08-310 (made public by ICC-01/05-01/08-501), para.12; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.13, Public Redacted Version of the 25 July 2014 Decision on Appeal from Decision on Indigence, paras.4-5). The authorities cited by the OPCV do not contain their proposed formulation for the standard of review. Rather, the authorities discuss the extent to which the standard for judicial review in England and Wales—which is closely related to the standard proposed by the Prosecution (*see* Response, fn.34)—should be relevant to (a) an alleged violation of article 5(4) of the European Convention on Human Rights (review of detention by a court, in the context of a parole claim); or (b) an alleged violation of article 6(1) of the European Convention (access to justice, in the context of the government’s publication of an investigative report concerning the applicants). On their particular facts, neither of these authorities assists in this situation. See, respectively, ECtHR, *Weeks v. United Kingdom*, Application No.9787/82, Judgment (Plenary), 2 March 1987, para.69; *Fayed v. United Kingdom*, Application No.17101/90, Judgment, 21 September 1990, paras.44-45.

¹⁹ See e.g. Counsel Observations, para.14. See also para.71 (“It is not that the Victims merely disagree with the Prosecutor; her findings are palpably unreasonable and unlawful in the sense of not having applied the correct legal standard for opening an investigation”).

representatives do not show that the Prosecution applied this standard incorrectly. While necessarily including appropriate legal analysis, the Report did not seek to make definitive findings on the information available, nor did it exclude any investigation on the basis that possible perpetrators might avail themselves of a legal defence under the Statute.

The Report correctly applied the law

20. Article 53(1) of the Statute provides that “[t]he Prosecutor shall, having evaluated the information available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed”, having regard to each of the criteria set out in article 53(1)(a) to (c).

21. At the outset of the Report, the Prosecution correctly set out the law amplifying this provision:

The preliminary examination process is conducted on the basis of the facts and information available. The goal of this process is to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation. The ‘reasonable basis’ standard has been interpreted by Pre-Trial Chamber II (“PTC II”) to require that “there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed’”. In this context, PTC II has indicated that all of the information need not necessarily “point towards only one conclusion”. This reflects the fact that the reasonable basis standard under article 53(1)(a) “has a different object, a more limited scope, and serves a different evidentiary purpose” than other, higher[,] evidentiary standards provided for in the Statute. In particular, at the preliminary examination stage, “the Prosecutor has limited powers which are not comparable to those provided for in article 54 of the Statute at the investigative stage” and the information available at such an early stage is “neither expected to be ‘comprehensive’ nor ‘conclusive’”.²⁰

²⁰ Report, para.4 (citing ICC-01/09-19-Corr, paras.27, 32, 34; ICC-01/05-01/09 OA, para.33). *See also* OPCV Observations, paras.17-19/

22. Neither the Comoros nor the victims' representatives show any error in this respect.²¹

23. Although the Prosecution agrees that it *shall* initiate an investigation when the criteria under article 53(1)(a) to (c) are fulfilled,²² this does not mean that any and all inconsistencies in the available information necessarily favour, in principle, the initiation of an investigation.²³ Rather, consistent with the law set out above, there is a distinction between conflicting information allowing two reasonable interpretations (which is resolved in favour of an investigation) and information that, considered in context, does not in fact establish a particular interpretation as being reasonable at all.²⁴ This distinction is further illustrated by article 53(1) itself, which makes clear that the Prosecution has a duty to "evaluate[] the information available", in order to determine whether the criteria for initiating an investigation are met.²⁵

24. The Prosecution's exercise of its duty to evaluate or to analyse the information available for a preliminary examination does not demonstrate that it incorrectly applied the governing law,²⁶ nor that it sought to disprove exculpatory interpretations or to restrict the scope of any investigation.²⁷ Equally, the Prosecution is not entitled to interpret the Statute "flexibl[y]" to make it any easier to initiate an investigation than the plain words of article 53 provide.²⁸ For the same reason, the policy standards adopted by the Prosecutor for her Office were intended to be, and must be, read consistently with the requirements of the Statute. Such an approach is

²¹ *Contra e.g.* OPCV Observations, para.26.

²² *See* Response, para.18.

²³ *Contra* OPCV Observations, para.17.

²⁴ *See also below* para.48.

²⁵ *See also* Statute, art.15(2) ("The Prosecution shall analyse the seriousness of the information received").

²⁶ *Cf.* OPCV Observations, paras.47, 50

²⁷ *Cf.* OPCV Observations, para.22.

²⁸ *Cf.* OPCV Observations, para.22. *See also* Response, para.27 (opposing the view that the Prosecution should initiate an investigation to disprove its initial reasoned view that there is no reasonable basis to proceed, since article 53(1) does not permit the initiation of an investigation if the Prosecutor determines that there is no reasonable basis to proceed).

not selective, much less “random” or “arbitrary”.²⁹ In any event, the Prosecution does not consider any aspect of the Report to depart from the policies of the Office.

The Report included appropriate legal analysis

25. The OPCV provides no authority directly supporting its assertion that the Prosecution “need not resolve legal complexities” in conducting a preliminary examination.³⁰

26. Although the Prosecution agrees that its view does not have judicial authority and is therefore to some extent provisional, it remains obliged to provide some legal characterisation of conduct in a preliminary examination. Without such analysis, it could not determine that there was a reasonable basis to believe any crime had been committed.³¹ Indeed, the Report expressly sought to avoid the resolution of legal complexities—such as the legality of the blockade—where the Prosecution did not consider it necessary to do so in order to resolve the preliminary examination.

27. The Prosecution must conduct its factual and legal analysis independently. Accordingly, it is unable to characterise certain conduct as illegal merely because “at least one reliable source points at the illegality” but can only do so based on its own appreciation of the law and facts, applying the appropriate standard of proof.³²

28. The inclusion of sufficient legal analysis supporting the Prosecution’s determination is also necessary to assist the Pre-Trial Chamber to conduct its review under article 53(3) of the Statute. If any such legal reasoning were incorrect,

²⁹ Cf. OPCV Observations, para.23.

³⁰ See OPCV Observations, para.21. The citation offered by the OPCV, which was also expressly noted in the Report, speaks only to the applicable evidentiary standard. See OPCV Observations, para.21, fn.26 (citing ICC-01/09-19-Corr, para.27).

³¹ See Response, para.103.

³² Contra OCPV Observations, para.49.

materially affecting the Prosecution's determination, the Pre-Trial Chamber's intervention could be warranted.

The Report did not seek to make definitive findings

29. Consistent with its accurate statement of the law, relating especially to the standard of proof, at no point did the Prosecution "seek to reach definitive findings with respect to the crimes alleged",³³ "definitive conclusion[s]",³⁴ or "final conclusions on validly contested legal points".³⁵

30. In any event, the primary issue in these review proceedings is not whether the Prosecution was unable to find a reasonable basis to believe that crimes had been committed—it was—but whether the Prosecution erred in concluding that any potential case would be inadmissible before this Court due to its lack of gravity. Although minor questions of fact also appear to be in issue between the Prosecution, the Comoros, and the victims' representatives, the gravity question is essentially a matter of the Prosecution's interpretation of the facts, not the facts themselves.³⁶

31. The OPCV fails to identify any particular instances in which the Prosecution allegedly applied an improperly high standard of proof, materially affecting the Report.

32. In this context, the OPCV is incorrect to contend that the Report took into account the "[e]xistence of grounds for excluding criminal responsibility" or "refer[red] to [...] the non-criminal character or the justification of some of the alleged conducts, *i.e.* self-defence, as the basis for not opening an investigation."³⁷

³³ *Contra* OPCV Observations, para.33.

³⁴ *Contra* OPCV Observations, para.48.

³⁵ *Contra* OPCV Observations, para.51.

³⁶ In this context, the OPCV's disagreement with the legal characterisation of certain conduct is also primarily (although not exclusively) a dispute about the application of the law to the facts—in other words, interpretation—rather than the underlying facts themselves. *See below* paras.64-73, 86.

³⁷ *Contra* OPCV Observations, paras.33, 49.

The references provided do not support this assertion.³⁸ To the contrary, concerning the possible application of any legal defence, the Report states unequivocally that such matters are irrelevant to a preliminary examination:

[T]he Office notes, however, that the evaluation of grounds for excluding criminal responsibility is distinct from the determination made at the preliminary examination stage regarding whether there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been or are being committed (*i.e.*, establishing subject-matter jurisdiction). Accordingly, the issue of whether a perpetrator committed a crime in self-defence and therefore may be absolved from criminal responsibility[] is to be properly addressed at the investigation and trial stages, and not the preliminary examination stage.³⁹

33. Applying this principle in practice, the Report expressly concluded that there was a reasonable basis to believe that wilful killings in the meaning of article 8(2)(a)(i) of the Statute were committed, notwithstanding that “self-defence is a possible ground for excluding criminal responsibility” at a later stage.⁴⁰ The Report made a similar finding with regard to wilfully causing serious injury under article 8(2)(a)(iii).⁴¹ Similarly, even though the legality of the blockade was unresolved, the Prosecution at no point in the Report applied a “combat justification” to limit any of the crimes for which it determined there was a reasonable basis.⁴²

The proper methodology was applied

³⁸ See OPCV Observations, para.49, fn.71 (citing Report, paras.55-57, 61, 67-68, 77, 103-109, and fn.108). Although some of these references do note the possibility of a defence of self-defence, they expressly exclude its relevance at this stage, as addressed below: *see* Report, paras.55-57, 61, 77, and fn.108. Other passages do not relate to defences or justifications at all but merely reflect aspects of the Prosecution’s factual and legal analysis with which the victims’ representatives disagree (concerning the alleged deliberate denial of medical treatment and the proportionality analysis): *see* Report, paras.67-68, 103-109.

³⁹ Report, para.57 (citing ICC-01/09-19-Corr, paras.29, 32). *See also* Response, paras.2, fn.6 (“The Prosecution also emphasises that it has taken no position at this preliminary examination stage on the question of self-defence”), 87 (“As expressly stated in the Report, the Prosecution did not consider whether IDF troops may have acted in self-defence during the boarding operation”).

⁴⁰ Report, para.61.

⁴¹ Report, para.77.

⁴² *See* Response, para.45.

34. The Statute and Rules require a preliminary examination to be procedurally and methodologically distinct from an investigation.⁴³ A preliminary examination is an analysis of information available to the Prosecution and not a procedure in which active measures are undertaken to obtain primary evidence to determine the truth. This follows from the fact that the Prosecution is not authorised to conduct an investigation until it has determined that the criteria in article 53(1)(a) to (c) of the Statute are met.

35. The preliminary examination in this situation, as reflected in the Report, was properly conducted. All relevant information available to the Prosecution was considered, the Report was adequately reasoned, and the correct approach was taken to conflicting information.

The Report considered all relevant information

36. The Report was based on appropriate consideration of all relevant available information, with the goal of reaching a “fully informed determination” whether to proceed with an investigation.⁴⁴ The OPCV shows no errors in this respect.

37. In conducting the preliminary examination, and drafting the Report, the Prosecution did not rely “exclusive[ly] [...] on international governmental reports” or fail to give adequate consideration to “other relevant information” such as victims’ statements, information provided by the Comoros, and reports prepared by third parties.⁴⁵ To the contrary, as previously set out in the Response,⁴⁶ the Report expressly stated that the preliminary examination was:

⁴³ See Response, paras.18, 25, 27; Report, para.4. See Statute, arts.15, 53; Rules, rule 104. See also OTP, *Policy Paper on Preliminary Examinations*, November 2013 (“Preliminary Examinations Policy”), para.85.

⁴⁴ Report, para.4.

⁴⁵ *Contra* OPCV Observations, paras.27, 31, 34.

⁴⁶ Response, para.21.

based on open and other reliable sources, which the Office has subjected to independent, impartial and thorough analysis. The Office has analysed the supporting materials and documentation accompanying the referral along with, *inter alia*, the reports published by the four commissions that have previously examined the 31 May 2010 incident.⁴⁷

38. The materials supporting the referral were not limited to the documents provided on 14 May 2013,⁴⁸ but also included additional information provided by the Comoros in May 2014 and by the Foundation for Human Rights and Freedoms and Humanitarian Relief (“IHH”), based in Turkey, in August 2014.⁴⁹ The IHH was one of the primary organisers of the 2010 flotilla and owned the *Mavi Marmara*.⁵⁰ These materials included:

- IHH publicity materials, including the pamphlet *Palestine Our Route, Humanitarian Aid Our Load*;⁵¹
- 56 statements of persons aboard the *Mavi Marmara* or other vessels;⁵²
- autopsy reports and photographs of nine deceased persons;⁵³
- material collected or prepared by the Comoros prior to 14 May 2013, including photographs, video footage, and submissions on the law and facts;⁵⁴
- further material prepared by the Comoros prior to 19 May 2014, including—

⁴⁷ Report, para.3.

⁴⁸ Report, para.5.

⁴⁹ Report, para.8.

⁵⁰ Report, para.8. *See further* fn.86.

⁵¹ *See* ICC-01/13-3-Conf-Anx1, p.20 (Appendices I and II).

⁵² *See* ICC-01/13-3-Conf-Anx1, pp.20-21 (Appendix IV). *See also* Response, para.23, fn.49; Response to Request to Reply, para.27.

⁵³ *See* ICC-01/13-3-Conf-Anx1, p.22 (Appendices IX and XI).

⁵⁴ *See* ICC-01/13-3-Conf-Anx1, pp.3-19 (submissions), 20-22 (Appendices III, V-VIII, X).

- a 26-page letter addressing matters discussed by the Prosecution with representatives of the Comoros and IHH in a meeting of 12 May 2014,
 - a summary of the content of statements previously supplied to the Prosecution,
 - a list of materials provided to the Victims Participation and Reparations Section (“VPRS”),
 - additional autopsy materials,
 - a document prepared by a private citizen, Richard Lightbown.⁵⁵
- a book containing interviews with 39 relevant persons, provided by IHH;⁵⁶ and
 - 13 statements by relevant persons, provided by IHH.⁵⁷

39. The Prosecution also reviewed various open source materials.⁵⁸ As noted in its Response, the Prosecution refrained from “examining [...] the crime scene” aboard the *Mavi Marmara*, on the particular facts of this situation, since it does not conduct investigative activity during a preliminary examination.⁵⁹

40. Under rule 104, the Prosecution sought “additional information” from appropriate sources for the purpose of its preliminary examination “analys[is]”.⁶⁰ For example, as noted in the Report, the Prosecution “offered Turkey and Israel the

⁵⁵ See ICC-01/13-3-Conf-Anx2. [REDACTED]. For these reasons, the Lightbown report was reasonably given little weight as a source: Response, para.82, fn.186.

⁵⁶ See Response, para.23, fn.49; Response to Request to Reply, para.27. This book appears to form part of the materials listed as having been provided to the VPRS: see ICC-01/13-3-Conf-Anx2, p.36 (“Book containing interviews with a selection of passengers”).

⁵⁷ See Response, para.23, fn.49; Response to Request to Reply, para.27. These statements appear to form part of the materials listed as having been provided to the VPRS: see ICC-01/13-3-Conf-Anx2, p.36 (“Selection of more victim statements”).

⁵⁸ See e.g. Report, fns.16-17, 33-34, 55, 57, 74, 86, 150, 241 (referring *inter alia* to reports prepared by third parties, official policy statements, press articles).

⁵⁹ *Contra* OPCV Observations, para.29. See also Response, para.25; *above* para.34.

⁶⁰ See also rule 104(2).

opportunity to provide additional information”, but both States declined to respond.⁶¹ The OPCV shows no error in its assertion that the Prosecution failed to request observations from the governments of Greece and Cambodia, which are parties to the Rome Statute, and the governments of Togo and Kiribati, which are not.⁶²

- First, the use of rule 104 is a broad discretion: the Statute expressly states that it is to be employed when “he or she [the Prosecutor] deems appropriate”.
- Second, no information in the Prosecution’s possession suggested that additional information from those governments would be of particular assistance for this preliminary examination.⁶³
- Third, the Prosecution publicly announced the opening of the preliminary examination in this situation,⁶⁴ and the relevant governments were able to make any representations or to share any information if they considered they were in a position to do so. They did not.
- Finally, the governments of Turkey and Israel were distinguished from the governments of Greece, Cambodia, Togo and Kiribati because the former were known to have investigated relevant events aboard the flotilla,⁶⁵ whereas no such investigation was known to have taken place by the latter.

⁶¹ Report, para.9. *See also* OPCV Observations, para.31.

⁶² *Contra* OPCV Observations, para.31.

⁶³ Notably, the information available to the Prosecution tended to show that the events aboard the *Mavi Marmara* were distinctive in their nature, gravity, and extent: *see* Response, para.89. Of the other two vessels in the Court’s jurisdiction, the *Rachel Corrie* (registered in Cambodia) was boarded peacefully on a later date (*see* Report, paras.81, 95) and the *Sofia* (registered in Greece) was boarded by force but on a lesser scale (*see* Report, paras.78-79; 94; Response, paras.90, 92-93). Other vessels, outside the Court’s jurisdiction, are similar. The *Defne* (registered in Kiribati) appears likewise to have been boarded relatively peacefully (*see* Response, para.91) and the *Sfendoni* (registered in Togo) was boarded by force but on a lesser scale (*see* Response, paras.93-93).

⁶⁴ ‘ICC Prosecutor receives referral by the authorities of the Union of the Comoros in relation to the events of May 2010 on the vessel *Mavi Marmara*’, 14 May 2013.

⁶⁵ *See* Report, para.13.

41. The OPCV is factually incorrect in its assertion that the Prosecution “fail[ed] to request or at least to consider information from other UN bodies and NGOs”, such as the “IHH Report and the Goldstone Report”.⁶⁶ As stated above, the Prosecution did receive and consider materials from IHH.⁶⁷ Likewise, although the Goldstone Report considered events in Gaza before 2010,⁶⁸ and was not directly relevant to the object of this preliminary examination, it was reviewed by the Prosecution and cited in the Report where appropriate.⁶⁹

42. Beyond these materials, and as previously clarified, the Prosecution did not have in its possession more than “230 victim applications”.⁷⁰ The Prosecution had also previously advised the Comoros that it had no power to inspect materials held by VPRS.⁷¹ This constituted no error.⁷² In any event, noting the Comoros’ assertion that the materials provided in August 2014 by IHH “contained victim applications previously submitted to the VPRS”,⁷³ the Report could not have been materially affected.

43. To the extent that the OPCV further argues that the Prosecution should have taken other steps to solicit and “to consider the victims’ views”, no error is shown.⁷⁴ For the purpose of its factual analysis, the Prosecution did consider the statements

⁶⁶ *Contra* OPCV Observations, para.32.

⁶⁷ *See above* paras.3738.

⁶⁸ *See* UN Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc.A/HRC/12/48, 25 September 2009 (“HRC Report”), paras.1, 12 (the mission was mandated to consider legal violations that might have occurred in the context of military operations in Gaza “during the period from 27 December 2008 [to] 18 January 2009, whether before, during or after”; in practice, the mission “focus[ed] primarily” on events in the period 19 June 2008 to 31 July 2009).

⁶⁹ *See* Report, para.27, fn.36.

⁷⁰ *See* Response, para.22, fn.49; Response to Request to Reply, para.29.

⁷¹ *See* Response, para.22, fn.49; Response to Request to Reply, para.30.

⁷² *Contra* OPCV Observations, para.30.

⁷³ ICC-01/13-15, para.30. *See also* ICC-01/13-3-Conf-Anx3, p.8 (letter stating “[t]he materials filed on 9 August were in fact not new, but were statements and documents that had been previously submitted to the VPRS by IHH”). The Prosecution still does not comprehend exactly how these materials amount to more than 230 victim applications, and hence continues to be unable to confirm whether the replicate those applications in whole or in part.

⁷⁴ *Contra* OPCV Observations, para.41.

available to it, and other materials, recounting the experiences of victims.⁷⁵ The preliminary examination process itself, however, was not a “judicial proceeding” in which victims could formally have participated.⁷⁶

44. The Prosecution has previously stressed the emphasis it placed on reviewing all the information available to it. In an exchange of letters between the Comoros and the Prosecution on 21 and 25 August 2014, in which the Comoros requested to “know [the] decision soon”,⁷⁷ the Prosecution stated:

[C]onsistent with the Office’s policy, all information provided to the Prosecutor during preliminary examination has to be comprehensively and thoroughly reviewed and analysed. Consequently, when new information is provided, the Office devotes the time and resources necessary to review such additional information and updates its analysis accordingly before making a determination. [...] It is incumbent upon the Prosecutor to exercise all due diligence in reviewing and analysing information provided to her and I can assure you that once the Prosecutor reaches a determination on the matter, you will be informed accordingly.⁷⁸

45. In its Report, as explained further below, the Prosecution was not obliged to provide express or extensive citations to the analysed material.⁷⁹ Yet not only do such citations exist,⁸⁰ it is in any event plain from the Report’s content that all the relevant

⁷⁵ See Response, para.26. See also above paras.3738.

⁷⁶ By analogy, see ICC-01/04-556 OA4 OA5 OA6, para.45 (“participation can take place only within the context of judicial proceedings [...] a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor”). See further ICC-01/13-8, para.6. See also Response, para.23 (“[a] preliminary examination is not an adversarial, party-driven judicial procedure in which the Prosecution addresses legal submissions or arguments presented to it. Instead, it is a procedure by which the Prosecution makes an independent and objective determination, applying the law correctly and based on its view of the information available to it”).

⁷⁷ See also Response, fn.43.

⁷⁸ See ICC-01/13-3-Conf-Anx3. In its letter in response, the Prosecution also noted that the additional information supplied on 19 May 2014 and 19 August 2014 was “voluminous”, requiring “thorough review and analysis”, and that those efforts were “on-going” prior to the Prosecutor issuing her decision once that “review process is completed”.

⁷⁹ See below paras.59, 63.

⁸⁰ See Report, fns.20, 96, 109, 111, 116, 122, 139, 203-206, 208-211, 238. These references were made in discussing matters including: the registration of the *Mavi Marmara*, the intent or motive of the passengers aboard the flotilla, the cause of death for certain passengers, the allegation that a deceased passenger was shot dead while taking photographs, the allegation that shooting continued after attempts had been made to surrender and/or individuals were already wounded, the nature of the alleged mistreatment of detained passengers by IDF

considerations were addressed.⁸¹ The fact that those same considerations were also discussed in the various international reports, and that those reports were cited instead, does not show any error. Nor does the OPCV identify with specificity any argument or issue which was insufficiently addressed, beyond merely asserting without substantiation that “crucially relevant information” was unconsidered.⁸² The OPCV’s claim that the Report “took into account irrelevant information”—also described as “unsupported facts or statements”—is also insufficiently particularised and unsubstantiated.⁸³

The Report properly addressed conflicting information

46. The Report did not take the approach to conflicting information now suggested by the OPCV. The OPCV suggests that the Prosecution erred by failing to attribute greater weight to some sources of information than to others,⁸⁴ and/or failed to resolve any remaining conflicts between sources in favour of initiating an investigation.⁸⁵ These claims are incorrect.

47. At no point in the Report did the Prosecution seek to resolve any legally significant analysis on the basis that the information in its possession was conflicting. As noted in response to the Comoros, the Prosecution accepted much of the witness information provided to it.⁸⁶ To the extent that the Prosecution occasionally noted accounts to be conflicting,⁸⁷ this reflected the thoroughness of the review and was not relied upon as a bar to the analysis. Thus, the Report noted conflicts in the accounts of the circumstances of the boarding of the *Mavi Marmara*,⁸⁸ and the circumstances of

soldiers, the number of passengers wounded, the humanitarian supplies carried by the Flotilla and the background of the passengers, and the number of passengers aboard the *Mavi Marmara*.

⁸¹ *Contra* OPCV Observations, paras.27, 31, 34.

⁸² *See* OPCV Observations, para.34.

⁸³ *Contra* OPCV Observations, para.34.

⁸⁴ *See* OPCV Observations, paras.35, 37, 45-46.

⁸⁵ *See* OPCV Observations, paras.35, 38, 40.

⁸⁶ *See* Response, paras.20, 26.

⁸⁷ *See e.g.* Report, paras.39, 41, 64, 67.

⁸⁸ Report, paras.39, 41.

the killings.⁸⁹ Yet it determined that there was a reasonable basis to believe that wilful killings and wilful injuries, in the meaning of articles 8(2)(a)(i) and (iii) of the Statute, were committed. Neither the Comoros nor the victims' legal representatives challenge the determinations in this respect. Similarly, although the Report noted the varying accounts of mistreatment aboard the *Mavi Marmara* while *en route* to port,⁹⁰ it determined that there was a reasonable basis to believe outrages upon personal dignity, in the meaning of article 8(2)(b)(xxi) of the Statute, were committed. The primary disputes in this respect concern the legal assessment of this conduct (whether it meets the severity requirement for the purpose of torture or inhuman treatment under article 8(2)(a)(ii), and the extent to which the mistreatment was material to the gravity analysis), and not the factual circumstances.⁹¹

48. Although the Prosecution must not refrain from opening an investigation on the basis that the information permits *different* reasonable interpretations,⁹² it was nonetheless required and entitled to make the threshold determination whether the information sufficed for a fact to be “reasonably” believed as part of the preliminary examination analysis.⁹³ On just one occasion did the Prosecution determine that a relevant factual allegation—whether injured passengers aboard the *Mavi Marmara* were intentionally denied medical treatment—was not reasonably open from the information in its possession.⁹⁴ In this instance, the Report clearly states that the information did not reach the threshold standard of ‘reasonableness’, and does not

⁸⁹ Report, para.39.

⁹⁰ Report, para.64.

⁹¹ See Response, para.104 (“The Comoros does not show that the Prosecution misapprehended the relevant conduct, whatever legal label was applied to it”). See *further below* paras.74-77, 112.

⁹² See *above* para.23.

⁹³ See Response, para.18 (“it is implicit that the Prosecution’s analysis of information requires and entitles it to weigh and to evaluate the content and reliability of the information available to it, in order to determine whether there is a ‘reasonable’ basis to proceed and not merely *any* basis. Otherwise, any referral or other submission pursuant to article 15, supported by even the barest information asserting a crime in the jurisdiction of the Court, would automatically trigger prosecutorial action to initiate an investigation”, emphasis supplied, footnote omitted).

⁹⁴ In addition, as a residual aspect of its analysis of the offence of extensive destruction and appropriation of property (under article 8(2)(a)(iv) of the Statute), the Report noted that insufficient information was received in order to make the necessary determination: see Report, para.88.

state that the Prosecution merely preferred a different (and exculpatory) reasonable interpretation.⁹⁵ On the facts, this conclusion was reasonable.⁹⁶

49. The correctness of the Prosecution's approach to conflicting information is further demonstrated by the manner in which it addressed the claims of live fire before the commencement of the boarding operation. As explained in the Response, although it noted that the information was conflicting, the Report expressly proceeded on the basis of "possibl[e]" live fire before the boarding.⁹⁷

50. The Prosecution's approach to the reports of inquiries convened by the UN Human Rights Council, the UN Secretary-General, and the governments of Turkey and Israel was also not in error. The OPCV contends that "there is a worrying lack of clarity as to how the Prosecutor distinguished and/or resolved the conflicting information in the Turkel and Turkish Reports" and "failed to discriminate in favour of the HRC Report".⁹⁸ However, neither of these claims arises from the Report.

51. Consistent with its obligations under the Statute,⁹⁹ the Prosecution conducted an *independent* analysis of the situation and the information available to it. Although it drew on the reports of the four inquiries (among other materials) as sources of information, and analysed them appropriately,¹⁰⁰ the Prosecution did not adopt any of the inquiries' conclusions on the law and facts but instead made its own determination. The OPCV shows no different.

⁹⁵ Report, para.68 (concluding "there is not a reasonable basis to believe that the mistreatment of passengers also included deliberate denial of medical treatment").

⁹⁶ See below para.54; see also below paras.147-151.

⁹⁷ Report, para.41; Response, para.81.

⁹⁸ OPCV Observations, paras.40, 46. See also paras.41 (alleging that the Prosecution gave "the most weight" to the Turkel Report), 45 (alleging that the Prosecution failed to "consider the impartiality of the HRC Report and consequently fails to attach the appropriate weight and reliability to the information contained therein").

⁹⁹ See e.g. Statute, arts.15(2), 42(1), 53(1).

¹⁰⁰ See further Preliminary Examinations Policy, paras.31-32 ("the Office pays particular attention to the assessment of the reliability of the source and the credibility of the information. The Office uses standard formats for analytical reports, standard methods of source evaluation, and consistent rules of measurement and attribution in its crime analysis. It checks internal and external coherence, and considers information from diverse and independent sources as a means of bias control").

52. Indeed, the OPCV acknowledges that the Prosecution relied roughly “equally on each of the [r]eports”.¹⁰¹ This is consistent with the extensive citations to each of the inquiry reports.¹⁰² In this context, taking into account their different strengths and weaknesses, the Prosecution was reasonable not to consider any one report as necessarily meriting greater weight *in toto* than any other. Rather, each offered slightly different insights on different specific issues. The Prosecution’s analysis in this respect was informed by the following considerations.

- All four of the inquiry reports were produced by qualified persons.
- The UN Human Rights Council Fact-Finding Mission (“HRC”) report was published first, within four months of the incident,¹⁰³ and relatively rapidly.¹⁰⁴ Although it received information from the government of Turkey, it did not receive information from the government of Israel.¹⁰⁵ The mission interviewed various witnesses, and had access to some forensic evidence, but gave limited weight to digital images with which it was provided.¹⁰⁶ The relevant witnesses were not publicly identified, but seem primarily to have been passengers

¹⁰¹ OPCV Observations, para.46.

¹⁰² For citations to the HRC report, *see* Report, fns.2, 10-13, 15, 18, 22, 42, 55, 57, 59-63, 68, 72-74, 76, 111-114, 116, 122, 127, 130, 135, 139-140, 142, 146-147, 149-150, 153, 161, 165-168, 182, 187, 202-203, 205, 208, 212, 235-236, 239. For citations to the Turkel report, *see* Report, fns.2, 10-11, 19, 42, 56, 59-68, 70-74, 77, 85-89, 97, 100-104, 109, 119, 125-126, 131-132, 139-140, 144, 146-150, 152, 154, 156-157, 165-166, 177-186, 205-207, 212-216, 220-223, 238, 241. For citations to the Turkish report, *see* Report, fns.2, 19, 42, 55-57, 59, 61-63, 68-69, 72-74, 76, 109-110, 113, 115-116, 120, 122-124, 128-129, 135, 139-141, 143, 146, 149, 152-153, 155, 203, 205, 212-213, 217, 238. For citations to the Palmer-Uribe report, *see* Report, fns.2, 14-15, 18, 41-42, 56-59, 61-63, 65, 67-68, 72-74, 76, 78, 81-82, 86, 96-97, 108, 110, 113, 116, 118, 121-122, 132, 135, 139-140, 143, 145-147, 152-153, 155, 161, 163-166, 178, 180, 188, 203, 205, 207-208, 212-215, 224-226, 238-240. The Prosecution notes the slight discrepancy with the similar assessment undertaken by the OPCV: *see* OPCV Observations, fn.56.

¹⁰³ The UN Human Rights Council report was published on 27 September 2010: *see* Report, fn.2.

¹⁰⁴ The UN Human Rights Council mission was convened in Geneva on 9 August 2010, less than two months before its report was finalised and published. *See* HRC Report, para.8.

¹⁰⁵ HRC Report, paras.13-14, 16-17. *But see also* para.12 (noting that the HRC mission obtained access to “some of the evidence” given to the Turkel inquiry).

¹⁰⁶ HRC Report, paras.19-24.

aboard the flotilla.¹⁰⁷ In addition, the report also refers to some open source materials, and some public testimony before the Turkel commission in Israel.

- The two national reports were published next, within a month of one another, and approximately four months after the HRC report.¹⁰⁸ Although the Prosecution concurs with the OPCV that the governments concerned may have had an interest in the relevant events,¹⁰⁹ each panel of inquiry appears to have used an appropriate methodology.¹¹⁰ Each national report enjoyed access to different evidence—
 - The Turkish report was primarily based on statements of approximately 100 victims collected by the panel of inquiry or the Office of the Istanbul Chief Prosecutor or from volunteers, as well as autopsy reports, medical and other records, video footage of various provenance, and open source materials.¹¹¹ These statements appear to include statements by persons represented by counsel in these proceedings.¹¹² In addition, the Turkish report also referred to the HRC report, and some internet records of public testimony before the Turkel commission in Israel.

¹⁰⁷ See HRC Report, paras.21-24.

¹⁰⁸ The first part of the Turkel report was published in January 2011, and the Turkish report was published in February 2011: *see* Report, fn.2. The second part of the Turkel report was published in 2013.

¹⁰⁹ See OPCV Observations, para.39.

¹¹⁰ See further UN, Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011 ("Palmer-Uribe Report"), para.11 ("Turkey established a National Commission of Inquiry [...] that operated within the Turkish governmental system with prosecutors, governmental officials, police and others bringing together the material that has been put in front of us. Israel established an independent Public Commission headed by a retired Supreme Court judge, Justice Turkel, with three other members and two distinguished foreign observers. Both investigation sought advice from specialist legal consultants").

¹¹¹ See Turkish National Commission of Inquiry, Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010, February 2011 ("Turkish Report"), pp.121-125.

¹¹² See Turkish report, pp.122-124. Victims represented in these proceedings who are also present on that list include (but may not be limited to) [REDACTED], [REDACTED]: *see* Counsel Observations, paras.16, 19-21, 23-25, 27, 31, 33-34, 36-38, 42-43, 45-46, 48, 56, 59-60. Statements or other materials by nine of these thirteen individuals were also provided, for example, in the materials presented by the Comoros or IHH.

- The Turkel report had detailed—and unique—access to IDF testimony,¹¹³ but did not have direct access to the evidence of Turkish citizens, including victims.¹¹⁴ Representatives of three Israeli human rights organisations, and two Israeli nationals who participated in the flotilla—and who are represented by counsel in these proceedings—did, however, testify.¹¹⁵ The Turkel commission also had access to video and photographic material, various documents (including internal investigation records and some hospital records), as well as written statements by some of the flotilla victims taken immediately after their detention.¹¹⁶
- As the OPCV properly notes,¹¹⁷ the Palmer-Uribe report had a distinct mandate which meant that it did not attempt “to determine contested facts”.¹¹⁸ The Palmer-Uribe report did not only consider the national reports, however, but also noted that it had “in front of it a range of material, including statements from 93 individuals that were appended to the Turkish report, and excerpts of statements by IDF personnel engaged in the incident that were included in the Israeli report.”¹¹⁹ As noted above, some of these statements appear to include statements by persons represented by counsel in these proceedings.¹²⁰ The panel also posed questions to the States concerned, and

¹¹³ Turkel Commission, *The Public Commission to Examine the Maritime Incident of 31 May 2010—Part I*, January 2011 (“Turkel Report”), p.21.

¹¹⁴ Turkel Report, pp.21-22. *See also* OPCV Observations, para.41.

¹¹⁵ Turkel Report, pp.22. The two Israeli citizens are [REDACTED] and [REDACTED]: *see* Turkel report, Annex A, p.284. Counsel now make submissions on their behalf: *see* Counsel Observations, paras.16, 19, 21, 27, 30, 53, 56, 60. To the Prosecution’s knowledge, no statement by either of these individuals was provided to it in the materials presented by the Comoros or IHH.

¹¹⁶ Turkel Report, pp.22-23.

¹¹⁷ OPCV Observations, para.42.

¹¹⁸ Palmer-Uribe Report, para.15. *See also* paras.6-8, 12 (“What the Panel has done is to review the two national reports and identify the differences over what happened arise. Where possible, we have tried to set out what is accepted as established by both Israel and Turkey, and where the areas of dispute lie. We set out what the Panel considers happened as far as that can be done on the information with which the Panel has been provided.”).

¹¹⁹ Palmer-Uribe report, para.7.

¹²⁰ *See above* fn.112.

received “written responses and additional material”, as well as meeting with those States’ representatives.¹²¹

53. The OPCV does not show that the Prosecution’s assessment was unreasonable, overlooking several aspects of the relevant context. Nor does it succeed in showing that the HRC report was the only one of the four reports to which the Prosecution could reasonably give any weight on any given issue.¹²² For example:

- The Turkel report was not yet published at the time of the HRC report and so could not have been the subject of its adverse comment.¹²³ Rather, the observation cited by the OPCV is a comment on perceived inconsistencies between the public component of one IDF witness’ testimony before the Turkel commission, a statement by the Permanent Representative of Israel before the UN Human Rights Council, and a submission made on behalf of the government of Israel before an Israeli court.¹²⁴ This has no bearing on the integrity of the Turkel report.
- Although the OPCV correctly points out that the Turkel commission had limited access to victims’ testimony, it omits to note that the UN Human Rights Council and Turkish inquiries had limited access to IDF testimony.¹²⁵

¹²¹ Palmer-Uribe report, para.10.

¹²² *Contra* OPCV Observations, paras.43-46.

¹²³ *Contra* OPCV Observations, para.39 (“This is even clearer for the Turkel Report, as crucial accounts contained therein have been found by the UN Human Rights Council to be “*so inconsistent and contradictory*” that it had no other option than to reject them”, emphasis supplied). The UN Human Rights Council report was published on 27 September 2010; the Turkel report (part one) was published in January 2011. *See* HRC Report, para.271 (noting that “the Turkel Committee and the Secretary-General’s panel have not concluded their sittings” and therefore refraining from “any remarks which are capable of being construed as not allowing those bodies to complete their tasks ‘unfettered by external events’”).

¹²⁴ *See* OPCV Observations, para.39, fn.53 (citing HRC Report, para.116). The relevant footnote of the HRC report notes the inconsistency between the testimony of General ASHKENAZI before the Turkel commission (stating that one IDF soldier was shot, and five were otherwise wounded), the statement of the Israeli Permanent Representative (two IDF soldiers were shot), and the submission before the Israeli court (no reference to IDF casualties): *see* HRC Report, para.116, fn.70.

¹²⁵ *See* OPCV Observations, para.41.

- Notwithstanding their different procedures and mandates, there is no basis to question the impartiality or the credentials of any of the panels of inquiry.¹²⁶

54. The OPCV likewise fails to substantiate its claim that the Prosecution gave “the most weight” to the Turkel report.¹²⁷ As already noted—and apparently conceded by the OPCV, albeit equivocally—the Report in fact addressed the four inquiry reports roughly equally.¹²⁸ As a matter of principle, given the unique access of the Turkel commission to IDF evidence, it would not have been unreasonable for the Prosecution to note that accounts conflicted even if “the other three reports” expressed one view and the Turkel report a different view.¹²⁹ In any event, given the general approach in the Report to conflicting accounts,¹³⁰ such an approach did not materially affect the Prosecution’s ultimate determination. This is demonstrated by the examples raised by the OPCV.¹³¹

- In paragraph 41 of the Report, the Prosecution noted that some accounts suggested live ammunition was fired by the IDF from boats and helicopters prior to the boarding of the *Mavi Marmara*, while the Turkel commission concluded that no such fire took place. The Prosecution concluded that “accounts of when live ammunition was first used and from where it emanated” significantly conflicted.¹³² This was a reasonable conclusion, which gave equal weight to *both* possibilities. Thus, as previously explained, the Report did not exclude the evidence of possible live fire before the boarding, nor give deference to the Turkel report in this respect.¹³³ The Prosecution has further stated its view that the existence of conflicting accounts was not

¹²⁶ Cf. OPCV Observations, paras.39, 43-44.

¹²⁷ *Contra* OPCV Observations, para.41.

¹²⁸ *See above* para.52.

¹²⁹ *Contra* OPCV Observations, para.45. *See above* para.52.

¹³⁰ *See above* paras.47-49.

¹³¹ *See* OPCV Observations, para.45, fn.69 (citing three examples at Report, paras.41, 64, 67-68).

¹³² Report, para.41.

¹³³ Response, para.81. *See also above* para.49.

surprising in the circumstances, which were chaotic,¹³⁴ and that such information did not materially affect the Prosecution's determination.¹³⁵

- In paragraphs 63-64 of the Report, the Prosecution noted that the findings of the Turkish and Turkel commissions regarding the treatment of the passengers detained aboard the *Mavi Marmara* differed "significantly".¹³⁶ Yet the Prosecution concluded that "the information available provides a reasonable basis to believe that some passengers were subjected to mistreatment by IDF soldiers", and enumerated the various kinds of mistreatment in question.¹³⁷ Contrary to the OPCV's claim, this analysis was thus resolved *against* the approach of the Turkel report. The Prosecution specifically noted the Palmer-Uribe panel's observation that "the more general explanations offered by the Turkel Report in response 'do not answer all the specific allegations made in the witness statements'".¹³⁸
- In paragraphs 67-68 of the Report, the Prosecution noted that the Turkish commission had concluded that IDF personnel had deliberately denied and impeded medical treatment to wounded passengers aboard the *Mavi Marmara*.¹³⁹ It also noted the finding of the HRC report that many wounded passengers "encountered difficulties" in accessing medical treatment,¹⁴⁰ the finding of the Turkel commission that "medical attention was prioritised on the basis of objective medical criteria";¹⁴¹ and the view of the Palmer-Uribe panel (considering the Turkish and Turkel reports) that the Turkel report's

¹³⁴ See Response, para.82.

¹³⁵ See Response, para.83.

¹³⁶ Report, para.63.

¹³⁷ Report, para.64.

¹³⁸ Report, para.64, fn.121.

¹³⁹ Report, para.67.

¹⁴⁰ Report, para.67. See also HRC report, paras.130-132 (noting information of delay in wounded passengers being moved by the IDF soldiers, that they were treated roughly, but that a number of casualties were progressively airlifted off the *Mavi Marmara*, and that medical treatment, including 14 field surgeries, was provided by IDF soldiers).

¹⁴¹ Report, para.67. See also Turkel report, pp.172-175.

findings were “detailed and plausible” and that “initial delays” in providing medical treatment were explained by the “chaotic situation” aboard the *Mavi Marmara*.¹⁴² Acknowledging these delays, the Prosecution concluded that there is no reasonable basis to believe passengers were deliberately denied medical treatment.¹⁴³ This conclusion did not give weight to the Turkel report to the detriment of the other three reports, but rather was consistent with the views of three inquiries (UN Human Rights Council, Turkel, and Palmer-Uribe) and inconsistent with one.¹⁴⁴

55. The OPCV likewise fails to substantiate its claim that the Prosecution gave insufficient weight to the HRC report.¹⁴⁵ The Prosecution does not, in the abstract, accord greater weight to certain “type[s]” of information, but instead considers the particulars of each source in the circumstances of each preliminary examination and the specific content they address.¹⁴⁶ Nor does the OPCV identify with particularity any factual matter addressed in the HRC report which it claims was insufficiently addressed in the Prosecution’s analysis. To the contrary, it merely expresses the wish that the Prosecution’s legal analysis reached the same conclusion on one point as the HRC.¹⁴⁷ Not only must the Prosecution’s application of the law to the facts be exercised independently—and as such there can be no error in failing to adopt a third party’s legal conclusions—but, as discussed below, the Prosecution’s analysis was correct and reasonable.

The Report is adequately reasoned

56. Rule 105 requires the Prosecution to give “reasons” for its conclusion when it determines not to initiate an investigation under article 53(1). As such, the

¹⁴² Report, para.67. *See also* Palmer-Uribe Report, para.144.

¹⁴³ Report, para.68.

¹⁴⁴ *See also above* para.48; *below* paras.147-151.

¹⁴⁵ *Contra* OPCV Observations, paras.45-46.

¹⁴⁶ *Cf.* OPCV Observations, para.44.

¹⁴⁷ OPCV Observations, para.53.

Prosecution cannot simply inform the referring State that it has decided not to proceed: it must provide some explanation. The Prosecution has endeavoured to do so in this situation through the publication of the Report. Nonetheless, the requirement for the Prosecution to provide reasons for its conclusion cannot be equated to the standards applicable to a Chamber of this Court when issuing a reasoned decision, such as a trial judgment on a matter of guilt or innocence. The obvious distinctions between a preliminary examination and an adversarial judicial proceeding, relevant to the standard of review applicable under article 53(3), are equally relevant to the degree of reasoning required for determinations under article 53(1).¹⁴⁸

57. The degree of reasoning required must be assessed in light of factors such as the nature of the preliminary examination process, the fact that a preliminary examination is not an investigation, and the nature of the review proceedings under article 53(3). The extent of the reasoning required may also vary depending on the particular circumstances of the preliminary examination.

58. Accordingly, the Prosecution considers that it should at least provide sufficient reasoning to explain the basis of its analysis under article 53(1), and the law and facts which it considered relevant for that assessment. This need not amount to each and every factual claim presented, having regard to the nature of the information which may be available for preliminary examinations.

59. The Prosecution and the Comoros further agree that the Prosecution is not obliged to cite or to expressly address each piece of information that it receives in the

¹⁴⁸ See above paras.15, 18. See also Response, paras.14, 20.

course of a preliminary examination¹⁴⁹—and, indeed, the Appeals Chamber has held that even a Trial Chamber does not bear such an obligation.¹⁵⁰

60. Likewise, having regard to the independent nature of the Prosecution’s analysis in a preliminary examination, the Prosecution does not consider that it is obliged to provide a reasoned view on the merits of observations made to it by a State Party (or any other person or organisation) in providing information to the Court.¹⁵¹ Rather, the crux of its reasoning must focus on explaining the basis for its own view, consequent upon its independent analysis.

61. For these reasons, the OPCV is incorrect to imply that the Report does not constitute “a *fully* reasoned decision”.¹⁵² Moreover, it generally fails to particularise any error in this respect. The Report was not insufficiently reasoned on either of the two issues specifically addressed.

62. First, although the Prosecution did not explain its reasons for the weight it afforded to the different inquiry reports in as much detail as it has done here, this was no error.¹⁵³ It was sufficient that the Report made plain in practice, as it did, the extent to which it relied on those reports on particular issues.

63. Second, the OPCV shows no deficiency of reasoning resulting from the absence of “express citations to the supporting information” on matters relating to the “reasons for the Israeli failure to suspend the attack on the vessels and on the intent behind said attack”.¹⁵⁴

¹⁴⁹ Request, para.38; Response, para.20.

¹⁵⁰ See Response, para.20, fn.45 (citing ICC-01/04-01/06-773 OA5, para.20).

¹⁵¹ See Response, para.23.

¹⁵² *Contra* OPCV Observations, para.36.

¹⁵³ *Contra* OPCV Observations, paras.36 (“the lack of consideration of the manner in which the available information was received undermines the validity of the method used to perform said factual analysis”), 45 (“without providing any explanation, the Prosecutor seems to rely greatly on the national reports”). The Prosecution does not, furthermore, accept the premise of some of these allegations: *see above* paras.5055.

¹⁵⁴ *Contra* OPCV Observations, para.33.

- The Report does not include a citation for the view that the IDF did not have a reasonable opportunity to suspend the attack after its commencement because that question was not addressed directly in the Report. Rather, as pointed out in the Response (when the matter was first raised),¹⁵⁵ the Report noted in detail the information showing the violent resistance to the IDF attack and the rapid capture of three IDF soldiers,¹⁵⁶ as well as the information that such a degree of resistance was not anticipated prior to the attack.¹⁵⁷ For the purpose of the Report, it sufficed to identify these facts, and to examine whether the attack was disproportionate under article 8(2)(b)(iv).
- The Report explained the basis for its view that the forcible boarding was intended (by the IDF planners) to enforce the blockade, with reference to the information showing that vessels of the flotilla were previously warned not to run the blockade and failed to stop.¹⁵⁸ In addition, as generally shown in the Report as a whole, the Prosecution did not regard the crimes reasonably believed to have been committed aboard the *Mavi Marmara* as being inconsistent with that information, especially in light of the much diminished violence aboard other vessels of the flotilla. This reasoning was adequate.

The Report properly appreciated the facts of the situation

64. The OPCV fails to show that the Report unreasonably assessed the facts of the situation, or erred in applying the relevant law.

The Report reasonably evaluated the alleged crimes

¹⁵⁵ See Request, para.114; Response, para.50.

¹⁵⁶ Report, paras.40-41 (citing HRC Report, paras.112-116, 125; Turkel Report, pp.127, 142-172, 247-251, 255; Turkish Report, pp.20-23, 114-115; Palmer-Uribe Report, paras.119, 123-125).

¹⁵⁷ Report, para.107.

¹⁵⁸ Report, paras.94, 105 (citing Turkel Report, pp.138-139, 141; Palmer-Uribe Report, para.110).

65. The Prosecution reasonably concluded that there is no reasonable basis to believe IDF soldiers committed the crimes of intentionally directing attacks against civilians (under article 8(2)(b)(i) of the Statute) or intentionally launching a disproportionate attack (under article 8(2)(b)(iv) of the Statute).¹⁵⁹

66. The OPCV misapprehends the Report when it suggests that the Prosecution's conclusion concerning attacks against civilians resulted merely from the varying accounts of the use of live ammunition by the IDF.¹⁶⁰ The Prosecution did not "consciously disregard" the reference in the HRC or Turkish reports to live fire before the boarding,¹⁶¹ to the contrary, as noted elsewhere in these submissions, the Report expressly noted that possibility.¹⁶² However, even if true, the Prosecution did not consider the use of live ammunition as such to be dispositive of the intended object of the attack as a whole—especially in the absence of information whether any live fire was targeted at civilians (as opposed to warning shots) or was authorised.¹⁶³

67. Rather, as further explained in the Response, the Prosecution concluded that there was no reasonable basis to believe civilians were intentionally attacked by the IDF on the basis of its view that:

- The information appears to show that the boarding operation was conducted in order to enforce the blockade, thus making the vessels (by their capture) the object of the attack;
- The means by which the attack was carried out (*i.e.*, a boarding operation, which enabled distinction between the persons aboard the vessels, and

¹⁵⁹ *Contra* OPCV Observations, para.53.

¹⁶⁰ *Contra* OPCV Observations, para.54.

¹⁶¹ *Contra* OPCV Observations, para.54.

¹⁶² *See above* paras.49, 54; *also below* paras.141-142.

¹⁶³ *See* Response, para.83.

between the persons and the vessels themselves) supported the view that the civilian passengers as such were not the intended object of the attack.

- The inconsistent approach to dealing with the civilians across the vessels of the flotilla likewise supported the view that the civilian passengers as such were not the intended object of the attack.¹⁶⁴

68. Although the OPCV may disagree with this analysis, it fails to show how it was unreasonable.¹⁶⁵

69. Accordingly, the Prosecution analysed the violent crimes committed against some passengers primarily within the framework of wilful killings and the wilful causing of serious injury (under articles 8(2)(a)(i) and (iii) of the Statute). Again, the OPCV does not show that this approach was either incorrect or unreasonable. In any event, even if the Prosecution erred by characterising the offences in this way, this does not materially affect the outcome of the Report. The OPCV does not show that the Prosecution misapprehended the relevant conduct, whatever legal label was applied to it, nor is it established that there is any hierarchy of offences under the Statute. The OPCV thus fails to show that the gravity analysis would have differed in any material respect as a result of a different legal characterisation.

70. The OPCV similarly fails to show any error in the Prosecution's conclusion that there was no reasonable basis to believe IDF soldiers intentionally launched a disproportionate attack under article 8(2)(b)(iv) of the Statute. To the contrary, both the Report and the Response shows that the analysis was correct and reasonable.¹⁶⁶

¹⁶⁴ See e.g. Report, paras.78-80, 99; Response, paras.37-39, 89-93.

¹⁶⁵ *Contra* OPCV Observations, para.55.

¹⁶⁶ See Report, paras.100-110; Response, paras.47-50.

71. In effect, the OPCV suggests that *any* degree of casualties would have been clearly excessive to the military advantage, which it defines as “enforcing the blockade against a flotilla known to be constituted by unarmed civilian activists.”¹⁶⁷ However, this *de minimis* analysis of the military advantage anticipated by the IDF in the circumstances is a mere disagreement with the factual assessment in the Report, without showing it was unreasonable. To the contrary, the Prosecution reasonably concluded on the facts that “[i]rrespective of its lawfulness, Israel would have viewed [the enforcement of the blockade] as essential to ensure that the blockade remained effective”.¹⁶⁸

72. In the context of this determination of the military advantage perceived by the IDF in enforcing the blockade, it was neither legally incorrect nor unreasonable for the Prosecution to conclude that it was not disproportionate to launch an attack in the anticipation only of “low level” violence and consequently “some degree of civilian casualties”.¹⁶⁹ The fact that the IDF’s assumption proved to be incorrect as the attack unfolded, with terrible consequences, does not alter this legal assessment.¹⁷⁰

73. The OPCV appears to misunderstand the point in the boarding operation at which the IDF might reasonably have been expected to disengage.¹⁷¹ The IDF was not reasonably expected to disengage in the interest of proportionality after its initial attempt to board the *Mavi Marmara* was repelled, since the violent confrontation between the IDF soldiers and the passengers had not yet arisen. Nor has the Prosecution determined that there is a reasonable basis to believe that IDF soldiers had already started shooting with live ammunition at passengers in response to the

¹⁶⁷ OPCV Observations, para.58.

¹⁶⁸ Report, para.104.

¹⁶⁹ Report, paras.107, 109. *See also* Response, para.49. *Cf.* OPCV Observations, paras.56-57. The “further reasoning” which the OPCV seeks is contained in paragraph 107 of the Report, setting out the assumption of limited violence on which the IDF seemed to be operating.

¹⁷⁰ *See* Report, paras.108-109.

¹⁷¹ *Contra* OPCV Observations, para.58.

failed initial attempt at boarding.¹⁷² Rather, as noted in the Response, the Prosecution considers that the approximately 40 minutes of the (second) boarding attempt do not appear to have offered an obvious and reasonable opportunity for the IDF to disengage *after* their troops had boarded the *Mavi Marmara* and encountered resistance.¹⁷³ Nor does the information available to the Prosecution make clear at what point, if at all, the IDF commander would have apprehended the danger that civilian casualties would be clearly excessive, even it was already apparent that the operation was not going to plan. In this context, the Prosecution was reasonable in its approach.

The Report correctly determined that the mistreatment of detainees did not amount to inhuman treatment

74. In asserting that the Prosecution “failed to consider the mistreatment” of detainees aboard the *Mavi Marmara* as conduct amounting to inhuman treatment under article 8(2)(a)(ii) of the Statute, the OPCV merely disagrees with the legal characterisation of the mistreatment in the preliminary examination.¹⁷⁴ As such, it fails to materially affect the Prosecution’s determination because it would merely swap one legal characterisation for a different one.¹⁷⁵

75. The OPCV shows no error in the Prosecution’s appreciation of the relevant conduct. The Report expressly determined that there was a reasonable basis to believe that outrages upon personal dignity in the meaning of article 8(2)(b)(xxi) of the Statute were committed by the mistreatment of detainees through means including handcuffing, enforced kneeling, physical and verbal harassment, exposure to the elements, and restricted access to refreshment and toilet facilities.¹⁷⁶ The

¹⁷² *Contra* OPCV Observations, para.58.

¹⁷³ *See above* para.63; Response, para.50.

¹⁷⁴ *Contra* OPCV Observations, para.66.

¹⁷⁵ *See above* para.69; Response, para.104.

¹⁷⁶ *See Report*, paras.64, 69, 72; Response, para.75. *Compare* OPCV Observations, para.67. *See further below* para.152.

OPCV's reference to the four inquiry reports, which were also cited in the Report, shows no error in this respect.¹⁷⁷

76. Nor does the OPCV show any error in the Prosecution's application of the relevant law. The Prosecution is obliged to apply the law to the facts independently, on a 'correctness' not 'reasonableness' standard, and may not merely adopt third party conclusions without conducting its own analysis. The OPCV is incorrect to assert that the Report determined the mistreatment not to meet the severity requirement of inhuman treatment "without providing any legal reasoning".¹⁷⁸ To the contrary, paragraph 69 of the Report sets out the Prosecution's view that the mistreatment did not rise to the necessary threshold, with reference to relevant caselaw.¹⁷⁹ The OPCV shows no error in this analysis.¹⁸⁰

77. The Prosecution notes the OPCV's statement that some victims "indicated that as Muslims they felt discriminated [against] on the basis of their religion and/or nationality" –but notes also that the OPCV does not particularise any error in the Report in this respect.¹⁸¹ In the Response, the Prosecution observed that it had not determined there was a reasonable basis to believe an identifiable group of passengers was discriminated against, but rather that varying persons and groups were subject to harassment.¹⁸²

The Report properly assessed the jurisdiction of the Court

78. The OPCV challenges the Prosecution's analysis of the Court's jurisdiction in two respects. Both must fail.

¹⁷⁷ See OPCV Observations, paras.60-64. See further e.g. Report, fns.118-128.

¹⁷⁸ Contra OPCV Observations, para.66.

¹⁷⁹ See further Response, paras.100-102.

¹⁸⁰ See also Counsel Observations, para.11.

¹⁸¹ OPCV Observations, para.67.

¹⁸² See Response, para.88. See further below paras.112, 114, 134, 145.

79. First, the OPCV's assertion that the Report erred by "failing to take into account all the factual parameters of the continuous crime[]" of outrages upon personal dignity (as the Prosecution found) is based on a faulty premise.¹⁸³

80. The OPCV misapprehends the meaning of the term "continuing crimes" in this context. While Chambers of this Court have used the term to describe ongoing acts manifesting the same material elements, they did so within the confines of the Court's jurisdictional framework.¹⁸⁴ There is no support for the proposition that the Court may extend its temporal or territorial jurisdiction beyond the scope of article 12 to examine ongoing or recurrent acts beyond those parameters.¹⁸⁵ Indeed, the ICTR Appeals Chamber has authoritatively rejected such an approach.¹⁸⁶

81. In any event, the Report made no determination that the relevant conduct—the mistreatment of detainees aboard the *Mavi Marmara*—was implemented systematically or as part of a broader plan or policy but rather concluded that "some passengers of the *Mavi Marmara*" were subjected to mistreatment by IDF soldiers.¹⁸⁷ In order to argue that the relevant conduct continued onto Israeli territory, the OPCV treats each individual perpetrator's offence as if it was a part of a larger system, which could then "continue" as the detainees were relocated.¹⁸⁸ The Prosecution does not consider that this approach can stand. In particular, the Prosecution notes that

¹⁸³ *Contra* OPCV Observations, para.70.

¹⁸⁴ For example, in *Lubanga*, both the Pre-Trial Chamber and Trial Chamber observed that the crime of conscripting or enlisting children into armed groups continued to occur each day that those under-age children continued to serve in that armed group: see ICC-01/04-01/06-803-tEN, para.248; ICC-01/04-01/06-2842, para.618. Likewise, in the *Côte d'Ivoire* situation, the Pre-Trial Chamber noted that the Prosecution could investigate crimes post-dating its application for authorisation under article 15 provided that those crimes were sufficiently linked to the authorised investigation: ICC-02/11-14-Corr, para.179.

¹⁸⁵ The Prosecution emphasises that this view is without prejudice to its position on the subjective or objective application of the territorial principle *within* article 12, a matter which the OPCV has not raised here.

¹⁸⁶ See ICTR, *Prosecutor v. Nahimana et al*, ICTR-99-52-A, Judgment, 28 November 2007 ("*Nahimana* AJ"), paras.723-724 ("The Appeals Chamber accordingly holds that the Trial Chamber could not have jurisdiction over acts of incitement having occurred before 1994 on the grounds that such incitement continued in time until the commission of the genocide in 1994. [...] It recalls that, even where offences may have commenced before 1994 and continued in 1994, the provisions of the Statute on the temporal jurisdiction of the Tribunal mean that a conviction may be based only on criminal conduct having occurred during 1994").

¹⁸⁷ Report, para.69. See also para.140.

¹⁸⁸ See e.g. OPCV Observations, paras.72-73, 75-76.

the information appears to show that alleged mistreatment ashore was perpetrated by a variety of Israeli personnel in a variety of locations and does not seem to relate especially to the IDF troops who participated in the boarding operation or persons in those troops' chain of command.¹⁸⁹ Accordingly, although the Prosecution takes no position whether the detainees were mistreated by Israeli personnel in Israel, it does not agree the information available shows a reasonable basis to believe that such conduct represented a continuation of the outrages upon personal dignity which may have been committed by individual perpetrators aboard the *Mavi Marmara*.

82. The Prosecution also does not agree with the OPCV on these facts that the mere continuation of the broad context—including “[h]istorical facts”, such as the boarding of the *Mavi Marmara* and her obliged transit to Israel—suffices to link separate offences committed by separate perpetrators to a single ‘continuing’ transaction which justifies expanding the Court’s jurisdiction beyond the parameters in the Statute.¹⁹⁰ Indeed, crimes falling within the Court’s jurisdiction may often be preceded by or connected to a variety of other events. This does not mean that the Court’s jurisdiction thus extends without limit, and would render nugatory the clear terms of article 12. The Court’s power to consider evidence of acts beyond its jurisdiction, in certain circumstances and for certain purposes, does not mean that its jurisdiction can be exercised over those acts.¹⁹¹

83. Second, the OPCV’s comments concerning the scope of the temporal jurisdiction of the Court in this situation have no impact on the Report.¹⁹² The Prosecution’s jurisdictional analysis in this situation was circumscribed by territory,

¹⁸⁹ See Response, para.88.

¹⁹⁰ *Contra* OPCV Observations, para.78.

¹⁹¹ See e.g. ICC-01/05-01/08-424, para.373 (holding that a person’s *mens rea* may be inferred by reference to acts preceding the temporal jurisdiction of the Court). See also *Nahimana* AJ, paras.310, 315 (recalling the admissibility of evidence of acts predating the temporal jurisdiction of the Court for certain purposes).

¹⁹² See OPCV Observations, paras.79-81.

not time.¹⁹³ Moreover, the Report expressly noted that the temporal scope of the situation referred to the Court by the Comoros “began on 31 May 2010 and encompasses all other alleged crimes flowing from the interception of the flotilla by Israeli forces, including the other related interception [of the *Rachel Corrie*] on 5 June 2010.”¹⁹⁴

The Report did not err in its approach to the blockade

84. The OPCV misapprehends the legal significance of the blockade in resolving this preliminary examination, especially regarding the possible crimes committed. The Report correctly determined that the legality of the blockade need not be resolved, based on the facts of this situation.¹⁹⁵ This is not inconsistent with the principle, recalled by the OPCV, that the Prosecution must address “all arguments that are *relevant* to the crimes alleged”.¹⁹⁶ Nor was the Prosecution required to set out the various arguments relating to the legality of the blockade if it was correct and reasonable in concluding that it was unnecessary to resolve the matter.¹⁹⁷

85. The Report correctly and reasonably identified nine offences under the Statute relevant for consideration in the preliminary examination. Neither the Comoros nor the victims’ representatives have challenged this finding. On the basis of the Prosecution’s analysis, it determined that there was a reasonable basis to believe three of these crimes were committed (wilful killing, wilfully causing serious injury, outrages upon personal dignity). It also made a conditional determination with respect to a fourth crime (intentionally attacking civilian objects).

¹⁹³ See e.g. Report, para.143 (“The referral concerns a confined series of events and alleged crimes concerning primarily the interception of the flotilla by IDF forces on 31 May 2010. The scope of the situation is further narrowed by the following considerations: (i) the Court’s territorial jurisdiction is limited to events occurring on only three of the seven vessels [...] and (iii) the Court’s *territorial jurisdiction* does not extend to any events that, while related to the events on board these vessels, occurred after individuals were taken off those vessels”, emphasis added).

¹⁹⁴ Report, para.7. See also para.95 (concluding that the *Rachel Corrie* was not the object of attack).

¹⁹⁵ *Contra* OPCV Observations, paras.84-85, 87.

¹⁹⁶ See OPCV Observations, para.87 (emphasis added).

¹⁹⁷ *Contra* OPCV Observations, paras.88, 98.

86. Contrary to the OPCV's assertion, and for the following reasons, the legality of the blockade would not substantially have affected the analysis in the Report as to whether there was a reasonable basis to believe those nine offences were committed.¹⁹⁸ Accordingly, the OPCV is incorrect to assert that the Report is, in reality, "almost exclusively based on the premise that the blockade is lawful."¹⁹⁹

- **Wilful killing** (article 8(2)(a)(i) of the Statute)—the Prosecution determined that, irrespective of the legality of the blockade, there is a reasonable basis to believe that this crime was committed.²⁰⁰ This entailed the determination of a reasonable basis to believe that persons killed aboard the *Mavi Marmara* were protected persons under the Geneva Conventions.²⁰¹ The question of any defences or justifications for the killings—which might emanate from the broader context—was not resolved for the purpose of the preliminary examination.²⁰² Thus, the approach taken to the legality of the blockade could not materially affect the analysis of this crime at this stage.
- **Torture or inhuman treatment** (article 8(2)(a)(ii) of the Statute)—the Prosecution did not determine that there is a reasonable basis to believe that this crime was committed because the conduct aboard the *Mavi Marmara* did not meet the 'severity' requirement.²⁰³ This conclusion would remain unchanged whether the IDF's view (at the time) of the legality of the blockade was objectively correct or incorrect.²⁰⁴ Thus, the approach taken to the legality of the blockade did not materially affect this determination.

¹⁹⁸ *Contra* OPCV Observations, paras.89, 94-95.

¹⁹⁹ *Contra* OPCV Observations, paras.91, 98.

²⁰⁰ Report, para.61.

²⁰¹ *See e.g.* Report, para.60.

²⁰² *See e.g.* Report, para.61. *See further above* paras.3233.

²⁰³ Report, para.69. *See also* Response, paras.100-104; *above* paras.74-76; *below* para.112.

²⁰⁴ *Contra* OPCV Observations, para.96.

- **Wilfully causing serious injury** (article 8(2)(a)(iii) of the Statute)—the Prosecution determined that, irrespective of the legality of the blockade, there is a reasonable basis to believe that this crime was committed.²⁰⁵ This entailed the determination of a reasonable basis to believe that persons injured aboard the *Mavi Marmara* were protected persons under the Geneva Conventions.²⁰⁶ The question of any defences or justifications for the injuries sustained—which might emanate from the broader context—was not resolved for the purpose of the preliminary examination.²⁰⁷ Thus, the approach taken to the legality of the blockade could not materially affect the analysis of this crime at this stage.
- **Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly** (article 8(2)(a)(iv) of the Statute)—the Prosecution did not determine that there is a reasonable basis to believe that protected property was extensively appropriated, although it noted that IDF soldiers had been criminally investigated for other property offences.²⁰⁸ To the extent that magnetic media were confiscated, the information available indicated that it was then returned.²⁰⁹ Likewise, based on the information available, the Prosecution does not agree that IDF conduct *vis-à-vis* the *Mavi Marmara* or *Sofia* (superficial damage, broken glass, etc) could have amounted to extensive destruction of property, even in the absence of legal justification for the damage.²¹⁰ Nor does the Prosecution understand on the facts that either vessel was “appropriated”, even though compelled to enter a particular port.²¹¹ Accordingly, the

²⁰⁵ Report, para.77.

²⁰⁶ See e.g. Report, para.76.

²⁰⁷ See Response, paras.40, 45 (referring to the absence of a “combat justification” in the Prosecution’s analysis); *further above* paras.3233.

²⁰⁸ Report, paras.84-88.

²⁰⁹ Report, para.84. The OPCV appears to mistake the legal significance of this analysis: see OPCV Observations, para.97.

²¹⁰ *Contra* OPCV Observations, para.97.

²¹¹ *Contra* OPCV Observations, paras.96-97.

approach taken to the legality of the blockade could not materially affect the analysis of this crime at this stage.

- **Intentionally directing attacks against civilians** (article 8(2)(b)(i) of the Statute)—the Prosecution did not determine that there is a reasonable basis to believe that individual civilians not taking direct part in hostilities were intended to be the object of attack.²¹² This conclusion was based on the information available, which the Prosecution considers to show that the *Mavi Marmara* and the *Sofia* were the object of the attack.²¹³ This conclusion would remain unchanged whether the IDF's view (at the time) of the legality of the blockade was objectively correct or incorrect.²¹⁴ The approach taken to the legality of the blockade thus does not materially affect the determination regarding the offence. To the extent that this offence may potentially also apply to unlawful violence directed by individual IDF soldiers against individual persons, the Prosecution considered that such offences were more appropriately characterised in these circumstances as crimes under articles 8(2)(a)(i) and (iii).
- **Intentionally directing attacks against civilian objects** (article 8(2)(b)(ii) of the Statute)—corresponding to its analysis under article 8(2)(b)(i), based on the information available, the Prosecution determined that the *Mavi Marmara* and the *Sofia* were intended to be the object of attack.²¹⁵ It made an expressly conditional determination that there is a reasonable basis to believe that this conduct amounted to a crime under article 8(2)(b)(ii) *if* the blockade were

²¹² Report, para.99; Response, paras.36-40.

²¹³ See Response, paras.36-40.

²¹⁴ *Contra* OPCV Observations, paras.90, 97. See also above para.67.

²¹⁵ See Report, paras.94, 99; Response, paras.36-40.

unlawful.²¹⁶ However, it reasonably determined that this need not be resolved for the purpose of the preliminary examination.²¹⁷

- **Intentionally directing attacks against personnel or objects involved in a humanitarian assistance mission in accordance with the UN Charter** (article 8(2)(b)(iii) of the Statute)—the Prosecution did not determine that there is a reasonable basis to believe that this crime was committed because the flotilla did not appear to fall reasonably within the definition of humanitarian assistance on the information available.²¹⁸ The approach taken to the legality of the blockade did not materially affect this determination. There is no basis for the OPCV’s assertion in this context that the Report “implicitly justifies the blockade” by its analysis in this respect.²¹⁹
- **Intentionally launching a disproportionate attack** (article 8(2)(b)(iv) of the Statute)—the Prosecution did not determine that there is a reasonable basis to believe the attack was disproportionate, based on its analysis of the information available concerning the military advantage anticipated by the IDF and the incidental death or injury to civilians anticipated by the IDF.²²⁰ The conclusion concerning the military advantage anticipated by the IDF would remain unchanged whether the IDF’s view of the legality of the

²¹⁶ Report, para.96. In taking this conditional approach, the Prosecution refrained from analysing the complex legal questions associated with *mens rea* and the relationship between the *jus ad bellum* and *jus in bello* which may otherwise arise. Cf. OPCV Observations, paras.93 (“in the event that the blockade is found to be unlawful, *Israel* would not have been entitled to take any measure to enforce the blockade”, emphasis added), 97. To the extent the OPCV implies the Court presently has jurisdiction over violations of the *jus ad bellum*, it is incorrect: see OPCV Observations, para.97.

²¹⁷ See Response, para.45 (noting the reasonable view that the harm resulting from any offence under article 8(2)(b)(ii) would to a large extent be subsumed in the analysis of other relevant crimes, that there was no reasonable basis to believe that the crimes for which a reasonable basis was found were linked other than causally to the blockade, and that, in the analysis of other crimes, no consideration was given to issues of justification or self-defence).

²¹⁸ Report, para.125.

²¹⁹ *Contra* OPCV Observations, para.97.

²²⁰ Report, paras.104, 109-110; Response, paras.47-50. See also above paras.70-72.

blockade was objectively correct or incorrect.²²¹ Thus, the approach taken to the legality of the blockade did not materially affect this determination.

- **Committing outrages upon personal dignity** (article 8(2)(b)(xxi) of the Statute)— the Prosecution determined that, irrespective of the legality of the blockade, there is a reasonable basis to believe that this crime was committed.²²² It also acknowledged information suggesting that “many” of the passengers aboard the *Mavi Marmara* were affected by this crime.²²³ The approach taken to the legality of the blockade did not materially affect this determination. The Prosecution notes the OPCV’s argument concerning the temporary detention of passengers,²²⁴ which might have further affected its analysis of this offence. However, in the circumstances, such an additional consideration would not have had sufficient impact to alter its gravity assessment.

87. In the context of the analysis described above, the OPCV is incorrect to assert that the Prosecution should have analysed the proportionality of the attack only if the blockade were considered lawful, or should have analysed the IDF’s compliance with its own rules of engagement if the blockade were considered unlawful.²²⁵ To the contrary, as the Report makes clear,²²⁶ proportionality is a requirement for any use of force regulated by international humanitarian law. By contrast, although national rules of engagement may be ascribed legal force under domestic law, they have no legal force under international law, but only evidentiary significance.

88. The OPCV is also incorrect to imply that the Prosecution’s objective view of the legality of the blockade would have altered its assessment of the (subjective) “actual

²²¹ *Contra* OPCV Observations, para.90. *See further above* para.71.

²²² Report, paras.69, 71.

²²³ Report, para.138, fn.239. *See further below* para.107.

²²⁴ *See e.g.* OPCV Observations, paras.90, 96.

²²⁵ *Contra* OPCV Observations, paras.83, 97.

²²⁶ *Contra* OPCV Observations, para.93.

intent and knowledge behind the interception of the vessels".²²⁷ The two issues are unrelated.

89. Consistent with the balanced approach in the Report, to which the Prosecution adheres, it will not address the OPCV's further arguments contending that the blockade was unlawful.²²⁸ However, the Prosecution notes its disagreement, described above, with the OPCV's view that the standard of proof applies to legal analysis as well as factual conclusions.²²⁹

The Report did not err in its approach to conflict classification

90. The OPCV's concerns about the approach to conflict classification in the Report would not materially affect the Prosecution's determination, and so may be dismissed. Even if the conflict were classified as a non-international armed conflict, as noted in the Executive Summary to the Report,²³⁰ the Prosecution considers that its determination would remain the same.

91. The crimes of principal relevance to this situation are substantially similar in both international and non-international armed conflicts.²³¹ In this context, the varying provisions of the Statute which would be applicable represent distinctions without a true difference.²³²

92. Likewise, the OPCV is incorrect to assert that, because the San Remo Manual was "[p]rimarily meant to apply to international armed conflicts at sea", the legality of a blockade on the high sea for a non-international armed conflict is necessarily

²²⁷ *Contra* OPCV Observations, para.90.

²²⁸ *See* OPCV Observations, paras.99-104.

²²⁹ *Contra* OPCV Observations, paras.86, 104. *See above* paras.26, 76.

²³⁰ Report, Executive Summary, para.17. This caveat appears to have been inadvertently omitted from the main body of the Report.

²³¹ *Compare e.g.* Statute, arts.8(2)(a)(i), 8(2)(a)(ii), 8(2)(a)(iii), 8(2)(a)(iv), 8(2)(b)(i), 8(2)(b)(ii), 8(2)(b)(iii), 8(2)(b)(iv), 8(2)(b)(xxi), *with* arts.8(2)(c)(i), 8(2)(c)(ii), 8(2)(e)(i), 8(2)(e)(iii), 8(2)(e)(xii). The Prosecution notes, moreover, that to any extent the legal regime applicable to international armed conflict may afford greater protection, the determination in the Report thus militated in favour of the referral.

²³² *Contra* OPCV Observations, para.110.

“doubtful”.²³³ To the contrary, since the San Remo Manual is not a source of law, but merely a “restatement” of the law in a particular context, its silence on a point cannot be dispositive as to the state of customary international law outside that context. In any event, it has been noted that “[s]ome issues were deliberately left out of the [San Remo Manual]” and that it was decided “not to exclude” non-international armed conflicts explicitly “so as to encourage the application of these humanitarian rules to possible naval operations undertaken during such conflicts.”²³⁴

93. In any event, however, the OPCV does not identify an error in the Prosecution’s classification of the conflict. The OPCV does not directly challenge the reasoning supporting the Report’s conclusion that “the situation in Gaza can be considered within the framework of an international armed conflict in view of the continuing military occupation by Israel”.²³⁵ Instead, it suggests that it is inconsistent with this analysis for the Report to refer to Hamas as a party to (or the fighting force of a party to) such an international conflict.²³⁶ Yet this identifies no necessary inconsistency.²³⁷

The Report reasonably determined that crimes against humanity were not committed

94. The OPCV claims that the Report’s analysis concerning crimes against humanity is “unsubstantiated” and (by implication) wrong.²³⁸ Although the analysis in the Report is indeed brief,²³⁹ it is adequate in the circumstances of this situation.

²³³ *Contra* OPCV Observations, para.109.

²³⁴ Doswald-Beck, L., ‘The San Remo Manual on International Law Applicable to Armed Conflicts at Sea,’ p.207 (noting also at fn.59 that paragraph 1 of the manual, “which defines the scope of application of the law, refers simply to the ‘parties to an armed conflict at sea’”).

²³⁵ *See* OPCV Observations, para.106.

²³⁶ *See* OPCV Observations, para.107.

²³⁷ Indeed, as noted in the Report, the Israeli Supreme Court has considered Hamas to be a party to international armed conflict with Israel, notwithstanding Israel’s view that it is not an occupying power. *See* Report, para.29, fn.41.

²³⁸ OPCV Observations, para.111.

²³⁹ *See* Report, paras.129-131.

95. In its analysis of crimes against humanity, the Report addressed only the requisite contextual requirement: whether the relevant conduct was committed as part of a widespread or systematic attack, or constituted in itself a widespread or systematic attack, directed against a civilian population.²⁴⁰ Once unable to be satisfied of a reasonable basis for this element, there was no requirement to continue the analysis further.²⁴¹

96. The OPCV mistakes the applicable standard of review. It is insufficient for it to show that “the information available to the Prosecutor provides a reasonable basis” to believe that the contextual element was satisfied, based on the number of passengers aboard the *Mavi Marmara* as such or “similar actions conducted against similar vessels [...] since they appear to evidence an Israeli policy *vis-à-vis* this type of flotilla[]”.²⁴² Rather, the OPCV must show that the Report’s conclusion to the contrary was *unreasonable*. It cannot do so.

97. In the first respect, as further explained in the Response, the Prosecution considered that the events aboard the *Mavi Marmara* were not widespread or systematic, neither of themselves or in the context of other IDF operations.²⁴³ Rather, they were akin to isolated acts which appear distinct in their nature, aims and consequences. It is well established that such acts do not establish the requisite nexus for crimes against humanity.²⁴⁴

98. In the second respect, no information is available to the Prosecution which establishes a reasonable basis to believe that events similar to those aboard the *Mavi*

²⁴⁰ See Report, para.130.

²⁴¹ See Report, para.131. *Contra* OPCV Observations, para.116.

²⁴² OPCV Observations, paras.114-115.

²⁴³ *Contra* OPCV Observation, para.114.

²⁴⁴ See Response, para.56, fn.120.

Marmara have occurred on similar vessels, or form part of an Israeli policy regarding such vessels.²⁴⁵

The gravity analysis was correct and reasonable

99. The OPCV does not show that the Report erred on the core issue in these review proceedings: the propriety of the gravity analysis under article 53(1)(b) of the Statute. To the contrary, the Report correctly identified the relevant legal criteria, and correctly and reasonably applied them to the facts of this situation. The fact that the Report did not proceed to conduct a complementarity analysis, having concluded that any potential case(s) arising from the situation were not sufficiently grave to be admissible before this Court, shows no error. Failure to satisfy either admissibility criterion suffices to render a case inadmissible.

The Report correctly identified the relevant criteria

100. Consistent with the Regulations of the Office of the Prosecutor, the Report correctly analysed the gravity of any potential case(s) arising from the situation with reference to “various factors including their scale, nature, manner of commission, and impact.”²⁴⁶ Within this context, the Report observed that consideration may be given to the persons who are likely to be the object of any investigation, as well as the circumstances of the crimes themselves.²⁴⁷ The Report also noted the *chapeau* to article 8(1) of the Statute which, in a somewhat different context, indicates that information suggesting crimes were committed pursuant to a plan or policy may significantly contribute to showing they are sufficiently grave to be investigated and prosecuted before this Court.²⁴⁸

²⁴⁵ *Contra* OPCV Observations, para.115.

²⁴⁶ *See* Regulations of the Office of the Prosecutor, reg.29(2); Report, para.136.

²⁴⁷ Report, para.135.

²⁴⁸ *See* Report, para.137.

101. The OPCV asserts that the Prosecution applied article 8(1) too restrictively, as the basis for concluding that it could not have regard to events outside the Court's jurisdiction.²⁴⁹ This mistakes the reasoning in the Report.

102. First, the Report does not state that the Prosecution considered article 8(1) prevented it from considering extra-jurisdictional conduct.²⁵⁰ To the contrary, the Report states initially that "it does not appear that the criteria of article 8(1)" —*i.e.*, the existence of a plan or policy — "are satisfied".²⁵¹ It then supplements this conclusion, made on the basis of events within the Court's jurisdiction, by stating "*especially* considering that the Court's jurisdiction does not extend to other alleged crimes" occurring in other territories.²⁵² In other words, the Prosecution determined that it should not in these circumstances seek evidence of a plan or policy outside the Court's jurisdiction. The Report is thus clear that its reluctance to exceed the Court's jurisdiction does not emanate from article 8(1).

103. Rather, as explained in the Response, the reluctance emanated from the common sense proposition that legal and factual analysis for the purpose of a preliminary examination should be confined, where feasible, to the territorial parameters of the Court's jurisdiction.²⁵³ There is an occasional exception to this principle when the facts of a situation show a rational link with the broader circumstances.²⁵⁴ However, the Report did not find information supporting such a rational link in this situation, and this has not been shown to be unreasonable.²⁵⁵

²⁴⁹ OPCV Observations, paras.120-122.

²⁵⁰ *Contra* OPCV Observations, para.121 ("the Prosecutor reached this conclusion on the basis of an interpretation *contra legem* and not *contra proferentem* of article 8(1)").

²⁵¹ Report, para.137.

²⁵² Report, para.137 (emphasis added).

²⁵³ Response, para.53.

²⁵⁴ Response, para.53.

²⁵⁵ *See* Response, para.54 (on the facts of this situation, such a rational link would have been satisfied by information suggesting a reasonable basis to believe that the crimes for which the Prosecution found a reasonable basis were intended to be part of the 'official' IDF operation to enforce the blockade, or some other information sufficiently linking the perpetrators, victims, or circumstances aboard the *Mavi Marmara* with events in Gaza.).

104. Second, the Prosecution agrees that information showing a reasonable basis to believe that there was a plan or policy is not a necessary condition for showing that the gravity requirement is met.²⁵⁶ On the particular facts of this situation, however, the Prosecution considered that the absence of such a plan or policy was relevant to its analysis under the four criteria of regulation 29(2) of the OTP Regulations. The OPCV fails to show that this view was unreasonable.

The Report correctly applied the relevant criteria

105. The OPCV fails to show that the Prosecution was unreasonable in weighing the four regulation 29(2) criteria relevant to its gravity analysis, in their proper context, or was “randomly selective”.²⁵⁷ Each criterion is considered in turn.

The Report did not err in analysing the scale of the crimes

106. The OPCV disagrees with the Report’s assessment of the scale of the crimes for which the Prosecution found a reasonable basis.²⁵⁸

107. In its analysis, the Report noted that the *Mavi Marmara* “was carrying over 500 civilian passengers”, and that ten were killed, around 50-55 were injured, and an unknown number subjected to outrages upon personal dignity.²⁵⁹ Although the Report in this passage did not specify the latter number of victims, it had previously referred to the finding of the Palmer-Uribe panel that “many” of the passengers were affected.²⁶⁰

²⁵⁶ Such a view is not expressed in the Report. Indeed the Report’s structure—which goes on to consider each of the regulation 29(2) criteria even after concluding that there is no reasonable basis to believe the crimes were committed pursuant to a plan or policy (“it does not appear that the criteria of article 8(1) are satisfied”)—supports this understanding. *See* Report, paras.137-148. *See also* OPCV Observations, para.122.

²⁵⁷ *Contra* OPCV Observations, paras.118, 123-124.

²⁵⁸ OPCV Observations, paras.125-127.

²⁵⁹ Report, para.138.

²⁶⁰ *See* Response, para.65 (citing Report, para.138, fns.238-239).

108. In this context, the OPCV's assertion that the Prosecution failed to consider whether more than 400 passengers were victimised does not show any error in the Report. The Report reasonably identified all those who were affected by the crimes for which a reasonable basis had been determined, if not in detail.²⁶¹ In this context, although the Report did not—and, indeed, could not—quantify the potential number of indirect victims (nor can this habitually be done in any situation), it sufficed that the Prosecution properly identified the relevant classes of crimes which, in each instance, would potentially have both direct and indirect victims. This approach showed no error.²⁶²

109. For the same reason, to the extent any persons aboard the *Sofia* and *Rachel Corrie* were indirect victims of the crimes aboard the *Mavi Marmara*, they were not excluded.²⁶³ This is a distinct consideration from the fact that the Report, rightly, did not assess direct victims aboard the *Sofia* and *Rachel Corrie* because no unconditional determination had been made of crimes committed aboard those vessels.²⁶⁴

110. Although the OPCV disagrees with the Prosecution's view of the scale of the crimes, it shows no error, nor that the Prosecution's view was irrational.²⁶⁵ Nor in any event was the gravity analysis conducted on the basis of the scale criterion in isolation. Indeed, as noted in the Response, the Report both recognised that even “a single event of sufficient gravity could warrant investigation” and underlined that the ultimate conclusion was based only on the “limited number of victims”

²⁶¹ *Contra* OPCV Observations, para.126.

²⁶² *Contra* OPCV Observations, para.126. Indeed, subsequently in the Report, the effect on indirect victims was expressly acknowledged: *see* Report, para.141.

²⁶³ This is supported by the discussion, subsequently in the Report, of the impact of the crimes “on victims and their families and other passengers involved, who suffered physical and/or psychological or emotional harm as a result”: *see* Report, para.141.

²⁶⁴ *Contra* OPCV Observations, para.126. *See also* Response, para.66.

²⁶⁵ *Contra* OPCV Observations, para.127.

considered in the context of the “limited countervailing qualitative considerations”.²⁶⁶

The Report did not err in analysing the nature of the crimes

111. There is no foundation for the OPCV’s implication that the Prosecution considered the gravity analysis to be weakened because only two of the three relevant war crimes constituted grave breaches of the Geneva Convention and one did not.²⁶⁷ To the contrary, the Report merely correctly noted the characteristics of the offences for which the Prosecution had determined a reasonable basis.²⁶⁸ The neutral significance given to this factor, in the context of this situation, is illustrated by the later omission of any reference to the “nature” of the crimes in the Report’s conclusions.²⁶⁹

112. Regarding the further implication that the gravity analysis might have been different if the Report had determined that inhuman treatment was committed rather than outrages upon personal dignity, the Prosecution reiterates its view that the severity requirement was correctly applied.²⁷⁰ Likewise, the Prosecution does not consider the information to show a reasonable basis to believe passengers were subjected to religious discrimination.²⁷¹ The OPCV shows no error in the gravity analysis in these respects.

The Report did not err in analysing the manner of commission of the crimes

113. The OPCV confuses two separate issues in challenging the Report’s analysis of the manner of commission of the crimes. Whereas it may be inherent in offences such as wilful killing, wilfully causing serious injury, and outrages upon personal dignity

²⁶⁶ Response, para.67 (citing Report, para.144).

²⁶⁷ *Contra* OPCV Observations, paras.128-130.

²⁶⁸ *See* Report, para.139.

²⁶⁹ *See e.g.* Report, paras.142, 144.

²⁷⁰ *Contra* OPCV Observations, paras.130-131. *See above* paras.74-76. *See also* Response, paras.74-78.

²⁷¹ *Contra* OPCV Observations, para.130. *See above* para.77.

that excessive and/or inappropriate force is used, this remains a different question from whether such offences are committed sporadically by individuals acting of their own volition or whether those offences are committed pursuant to a policy or a plan. Accordingly, in its analysis of the manner in which the crimes were committed, there was no inconsistency in the Report determining that the force used against passengers aboard the *Mavi Marmara* was excessive in a number of instances but observing that there is no information suggesting those crimes were systematic or committed according to a plan.²⁷² This finding is reasonable, and shows no error.²⁷³ Implicit in this finding, in the circumstances of this situation, is the notion that some victims were defenceless.²⁷⁴

114. Although the OPCV evidently disagrees with the Prosecution's view that there was no rational link between the crimes in this situation and the circumstances in Gaza, it fails to particularise an error in this respect. Nor does it show an error in expressing its subjective view of the extreme seriousness of the events aboard the *Mavi Marmara*.²⁷⁵ The Prosecution likewise recalls its view concerning religious discrimination.²⁷⁶

The Report did not err in analysing the impact of the crimes

115. The OPCV's reference to "the suffering endured" by the victims, and the "terror instilled" in them, shows no error in the Report's analysis of the impact of the crimes.²⁷⁷ Indeed, the Report expressly recognises the "significant impact on victims and their families and other passengers involved", including the resulting physical, psychological or emotional harm.²⁷⁸

²⁷² Report, para.140.

²⁷³ *Contra* OPCV Observations, para.132.

²⁷⁴ *See* OPCV Observations, para.134.

²⁷⁵ *See* OPCV Observations, para.133.

²⁷⁶ *Contra* OPCV Observations, paras.134-135. *See above* paras.77, 112.

²⁷⁷ *Contra* OPCV Observations, para.136.

²⁷⁸ Report, para.141. *Contra* OPCV Observations, para.137 (asserting "there is no apparent reason for the Prosecutor's lack of consideration of these factors").

116. The cases to which the OPCV seeks to compare any potential case(s) arising from this situation do not assist it.²⁷⁹ Caution in such comparisons is generally warranted.²⁸⁰ In considering the *Abu Garda* case, to which the Report referred, the OPCV overlooks the significance of the specific qualitative factors in that case.²⁸¹ In particular, the Haskanita crimes targeted peacekeepers, and hence persons who represent not only the international community but also the fundamental interest in maintaining international peace and security.²⁸² This was the relevance of the Prosecution's consideration whether the flotilla might be considered a peacekeeping or humanitarian mission.²⁸³ Likewise, as noted in the Response, the cases prosecuted from the Democratic Republic of Congo are not only distinguished by their quantitative but also qualitative characteristics, such as the use of children to participate in hostilities.²⁸⁴

The complementarity analysis is independent of the gravity analysis

117. The OPCV shows no error in the fact that the Report did not proceed to conduct a complementarity analysis, once it had concluded that any potential case(s) arising from the situation were not sufficiently grave to be admissible before this Court. Nor is there any error in the fact that the Report conducted the gravity analysis before turning to any complementarity analysis.²⁸⁵ To the contrary, article 17 imposes no priority in the Court's assessment; a case, or potential case, will be inadmissible in the event either criterion is not met. Conversely, a case or potential case which is

²⁷⁹ *Contra* OPCV Observations, para.139.

²⁸⁰ *See* Response, para.69 (recalling generally that care must be exercised in comparing the scope of potential case(s) in a situation and actual cases selected for prosecution at the conclusion of an investigation).

²⁸¹ *See* OPCV Observations, para.139.

²⁸² *See* Report, para.145; Response, para.72.

²⁸³ *Contra* OPCV Observations, para.139.

²⁸⁴ *See* Response, para.73; *contra* OPCV Observations, para.139. It is immaterial that, in the *Katanga* case to which the OPCV refers, Mr Katanga was in fact acquitted of responsibility for the use of child soldiers, even though it was established that child soldiers were "fully integrated" into the Ngiti militia: *see e.g.* ICC-01/04-01/07-3436-tENG, paras.1086-1088.

²⁸⁵ *Contra* OPCV Observations, paras.141-142.

inadmissible for lack of gravity is not 'saved' by the fact that the relevant State(s) is inactive or otherwise unable genuinely to investigate and/or prosecute it.

118. Accordingly, the OPCV's submission "that no national proceedings are being or have been conducted" is not material to the determination in the Report.²⁸⁶ Likewise, the Report makes no determination that an investigation would not be in the interests of justice, in the sense of article 53(1)(c).²⁸⁷

Victims' observations must be assessed in their proper context

119. In addition to OPCV's legal submissions, both sets of victims' representatives seek to convey to the Pre-Trial Chamber the specific views of their clients. Consistent with the Statute and the Rules, as well as its own policy,²⁸⁸ the Prosecution appreciates and supports the right of participating victims to address the Court in this context.

120. The Prosecution notes in particular the OPCV's submission that "the victims' reactions to the findings made by the Prosecutor [...] revealed mixed feelings of anger, disbelief and fear at the prospect that they may be abandoned by the Court."²⁸⁹ Victims represented by independent counsel also "expressed that they were most disheartened and immensely frustrated by the Prosecutor's decision not even to open an investigation into the crimes committed against them and the harm they have suffered."²⁹⁰

²⁸⁶ *Contra* OPCV Observations, para.152. *See also* Counsel Observations, para.7.

²⁸⁷ *Contra* OPCV Observations, para.153.

²⁸⁸ *See e.g.* OTP, *Policy Paper on Victims' Participation*, April 2010, Executive Summary, p.1 ("The Office of the Prosecutor [...] believes that victims bring a unique and necessary perspective to the activities of the ICC [...] [V]ictims are actors of international justice rather than its passive subjects. Their participation is a statutory right, not a privilege").

²⁸⁹ OPCV Observations, para.157.

²⁹⁰ Counsel Observations, para.5.

121. In this part of its response, the Prosecution wishes to address these observations, to clarify areas of agreement and disagreement, and to explain the reasons why. Having regard to the particular complexity of the factual submissions made on behalf of the victims represented by independent counsel, the Prosecution will conclude by addressing those in detail.

Response to personal observations of victims

122. The Prosecution must discharge its mandate independently and impartially in accordance with the Statute, and according to its best appreciation of the situation. However, it acknowledges the significant and heartfelt consequences of the determinations that it makes. It is not a responsibility borne lightly. The Prosecution wishes neither to minimise nor to ignore the views of any victim who feels aggrieved by its determination, but to address those views frankly and honestly.

123. On some matters, the Prosecution agrees with the views articulated by the victims through their representatives. It agrees that all crimes should be investigated by the proper authorities, and that any incident in which ten people were killed, more than fifty injured, and many others harmed, is very serious.²⁹¹ As the Prosecution has underlined in its Response, as well as in these submissions, the events aboard the *Mavi Marmara* should be investigated and, if the allegations are well-founded, prosecuted by the appropriate authorities.²⁹² The victims have this right to an effective remedy under national law.

124. Likewise, the Prosecution appreciates concerns about an 'accountability gap' as a consequence of a lack of an effective national response. Thus, the Prosecution recalls that it is obliged by its mandate to analyse the gravity of any potential case(s) arising from a situation, even where it finds a reasonable basis to believe that crimes

²⁹¹ See OPCV Observations, paras.159-160; Counsel Observations, paras.5-6.

²⁹² See above para.2; Response, paras.2, 4.

within the jurisdiction of the Court have been committed. Yet, by their nature, all crimes under the Statute are very serious. The Prosecution recognises and shares the victims' concern about the just disposition of cases which are not sufficiently grave to be heard by this Court.²⁹³

125. Where the victims make evidentiary assertions through their legal representatives, or express their subjective disagreement with the Prosecution's legal reasoning, the Prosecution must respectfully acknowledge any differences of opinion. It does so in two chief respects. In this context, it reiterates its independence and impartiality, and the reasoned basis for its determination as set out in the Report, the Response, and in these submissions.²⁹⁴

126. First, in a preliminary examination, and having regard to the necessary screening required for many communications to the Court in this context, the Prosecution cannot give weight to opinions which lack a foundation of relevant personal knowledge. Thus, although the Prosecution respects the victims' honest belief or perception that crimes committed aboard the *Mavi Marmara* may have been deliberate and planned, and intended to 'punish' them, it cannot depart from its own reasoning on that basis.²⁹⁵ Likewise, the Prosecution is mindful of the victims' opinion that "non-violent means" of halting and/or boarding the *Mavi Marmara* were "readily available",²⁹⁶ but notes the contrasting information considered in its

²⁹³ See OPCV Observations, para.160 ("Victims also heavily criticised the Prosecutor's finding that the situation was not grave enough").

²⁹⁴ Cf. OPCV Observations, para.162; Counsel Observations, paras.10-11, 39, 50.

²⁹⁵ See OPCV Observations, para.158; Counsel Observations, paras.11-12, 16, 26, 40, 46, 53. For example, independent counsel assert that the "Prosecutor has wrongly given little if any weight" to the "evidence of the Victims themselves" in considering whether the passengers were deliberately attacked in the meaning of article 8(2)(b)(i) of the Statute: see Counsel Observations, para.16. However, the observations quoted by counsel do not show the foundation for the victims' views in this regard, or refer to facts already considered in the analysis. Indeed, many observations honestly reflect that they are personal opinions ("I think the Israelis came with the full intention of attacking the passengers [...] I think they were trying to teach us a lesson", "I assumed that their strategy was to kill some people", "I believe that the plan was to punish the passengers [...] I believe that this was a political decision"). The Prosecution does not consider that these observations alter its analysis.

²⁹⁶ See Counsel Observations, para.21. It is unclear what foundation the quoted victims have to offer the opinion that any vessel could be practicably and safely immobilised by attempting to "jam[] the propellers" or "hit[] the propellers" or that the IDF possessed such means at the material time.

analysis.²⁹⁷ In general, the Prosecution cannot reconsider its own reasoning simply on the basis of subjective disagreement,²⁹⁸ or the victims' view of the "obvious" nature of a core issue,²⁹⁹ or that certain conduct (killings, mistreatment) was the same in both Gaza and aboard the vessels.³⁰⁰ Not only do such views lack the necessary probative value, but they also fail to meet the standard of review for these proceedings.³⁰¹

127. Second, the Prosecution cannot alter its view based on victims' assertions which it considers to be irrelevant to the requirements of the applicable law, or to be inconsistent with the applicable law or procedure. Thus, the facts that the events of this situation occurred in international waters, or that victims regard a particular State generally to disregard international law, were not material to the Prosecution's analysis.³⁰² The victims' own view that their mistreatment was 'severe' does not alter the Prosecution's duty to give its reasoned view, objectively, whether the conduct satisfied the severity requirement for inhuman treatment.³⁰³ Nor can a general desire for deterrence, or a belief in the power and significance of international justice, be a substitute for satisfying the criteria established in the Statute for initiating an

²⁹⁷ See Report, paras.40-41, 94, 105-106 (noting the previous unsuccessful attempt to board the *Mavi Marmara*, and the violent resistance subsequently encountered). See also Turkel Report, pp.272 (noting "an understandable and strongly held view across Government that a use of force against the ships"—presumably, as objects themselves—"could not be justified on moral grounds"), 273 (noting that options "for the graduated use of force to stop the ships" were mostly "ultimately rejected by the military itself as impracticable").

²⁹⁸ See OPCV Observations, para.163; Counsel Observations, paras.15, 31. See also OPCV Observations, para.161.

²⁹⁹ See Counsel Observations, paras.50-52 (asserting that the victims' views of the "obvious" nature of the link between the "attack on the Flotilla and the situation in Gaza"). The Prosecution notes, however, that it is not the link between the interception of the flotilla and the situation in Gaza which is relevant, but information linking the crimes for which the Prosecution found a reasonable basis and the situation in Gaza: see Counsel Observations, para.54; Response, paras.54, 56-58.

³⁰⁰ See Counsel Observations, para.55 ("The behaviour of the commandos [...] was so similar in nature to the commonplace killing and injury of those defending Palestinian rights [...] characterised by excessive use of force", "The army behaviour that is happening in Palestine for ages was the same behaviour that happened on the [*Mavi Marmara*]").

³⁰¹ See above paras.15-18.

³⁰² See OPCV Observations, para.158.

³⁰³ See Counsel Observations, para.42. See further Report, para.69; Response, paras.100-104.

investigation.³⁰⁴ The Prosecution does not take investigative measures as part of a preliminary examination.³⁰⁵

128. To the extent that victims or other persons or States possess relevant information which has not previously been available for the preliminary examination, the Prosecution stresses that they remain able to communicate that information to the Court under article 15 of the Statute. As stated in the Report, the decision not to initiate an investigation in this situation may be reconsidered by the Prosecution under article 53(4) at any time, based on new facts or information.³⁰⁶

The complex submissions presented by independent counsel require careful analysis

129. The Prosecution notes the complexity of the submissions made by independent counsel on behalf of some victims, which address in particular eleven factual issues.³⁰⁷ Although this is a legitimate approach, the Prosecution respectfully reminds the Pre-Trial Chamber of the need to distinguish between information which was available for the purpose of the preliminary examination and information which was not available. To the extent that information was not available for the preliminary examination, it cannot show an error in the analysis undertaken. Rather, such material may in principle be considered by the Prosecution as a basis, in its independent discretion under article 53(4), to reconsider its current determination under article 53(1).

130. Over the following pages, the Prosecution states whether the eleven factual submissions now advanced by counsel were considered in the Report, whether they

³⁰⁴ See OPCV Observations, para.162; Counsel Observations, para.8 (“Victims rightly regard the ICC as the appropriate forum to ensure accountability and justice, and thus to safeguard their interests”).

³⁰⁵ See Counsel Observations, para.11 (“it would have been obviously essential *as part of an investigation* to obtain independent expert military and/or naval advice at the very highest level to deal with how properly to control (stationary) vessels [...] there is no indication that the Prosecutor even considered obtaining [...] such advice”, emphasis added). See *above* para.34.

³⁰⁶ Report, para.151.

³⁰⁷ See *generally* Counsel Observations.

are fresh information concerning a matter considered in the Report, or whether they constitute a new contention not considered in the Report.

131. As a preliminary matter, however, the Prosecution observes that some factual submissions by independent counsel may require particular caution.

- Counsel have included observations on a provisional basis from some (unidentified) victims who have not formally been qualified to participate in these proceedings.³⁰⁸
- Counsel also appear to transmit some observations from victims which are based on a misunderstanding of the Report—for example, although the Prosecution noted that accounts of the relevant events vary and may conflict, no part of its determination turned upon “uncertainty” or an “overall lack of sufficient information”.³⁰⁹ Elsewhere, independent counsel correctly identify that the issue in dispute is the gravity of any potential case(s) arising from the situation.³¹⁰
- A number of observations are made without reference to the underlying source. To the extent that the victims’ observations described by independent counsel are not material previously available to the Prosecution, the Prosecution does not have access to those documents and can respond only on the basis of the excerpts provided by counsel. In particular, the Prosecution

³⁰⁸ See Counsel Observations, fn.5.

³⁰⁹ See Counsel Observations, para.9. See further above paras.47-48. For example, the paragraph of the Report cited by independent counsel for this proposition refers to the Prosecution’s acknowledgement that the precise circumstances of the killings aboard the *Mavi Marmara* are uncertain—but this was no bar to the Prosecution finding that there was a reasonable basis to believe wilful killings were committed: see Report, paras.39, 61. To the contrary, the Prosecution’s comment on the information available to it had no relevance to its determination in this respect. The Prosecution determined that it could not initiate an investigation because any potential case(s) arising from the situation were not sufficiently grave to be admissible before this Court, not because “there is some ‘uncertainty’ over ‘conflicting accounts’”.

³¹⁰ See Counsel Observations, paras.10, 14.

notes that it can provide very limited comment regarding unelaborated “See also” references to material which it does not have in its possession.³¹¹

132. The Prosecution stresses that, although it is obliged for the sake of clarity to address the various factual claims now made by independent counsel, they are generally directed to issues which were either reasonably addressed in the Report, are immaterial to the basis upon which the determination under article 53(1) was made, or do not rise to the threshold level of reliability required for a preliminary examination. To the contrary, in the Prosecution’s view, the core facts remain untouched. The crimes which it reasonably believes to have been committed aboard the *Mavi Marmara* do not appear to have been the result of a plan or policy, but rather were situated in the circumstances prevailing on that night and on that vessel. This makes them no less potentially odious, but it does affect their admissibility before this Court.

Alleged motion of the Mavi Marmara at the time of the attack

133. Counsel assert that the vessels of the flotilla “were stationary when the IDF launched its attack”.³¹² The materials available to the Prosecution for the preliminary examination differed on this question. For example, the Lightbown report claimed to present apparently reliable (AIS, or Automatic Identification System) data from an open source maritime tracking system showing the *Mavi Marmara* sailing on a course of 185° at 7 knots “[a]t [0]4:27:52, moments before the start of the attack” at approximately 04:30.³¹³ After the attack began, the same source suggests that the *Mavi Marmara* changed course and accelerated to 12.5 knots by 04:53:51 and 13.8

³¹¹ See e.g. Counsel Observations, fns.27-34, 44-46, 48, 55, 57, 59, 69, 76-78, 91, 96, 98, 113, 120, 122.

³¹² Counsel Observations, para.11 (emphasis supplied). See also para.21 (quoting [REDACTED]). A statement by this person has not previously been available to the Prosecution.

³¹³ Lightbown report, provided to the Prosecution by the Comoros (see above fn.55), p.157 (citing “[d]ata provided by marinetraffic.com”). See further e.g. <http://www.marinetraffic.com/en/p/ais-historical-data> (accessed 7 July 2015). For an introduction to AIS, see https://en.wikipedia.org/wiki/Automatic_Identification_System (accessed 7 July 2015) (noting that AIS traffic is unauthenticated and unencrypted).

knots by 05:06:48 before coming to a near halt at 05:51:58.³¹⁴ In any event, since the *Mavi Marmara* and other vessels had already refused the warnings issued by the IDF and resisted initial attempts at boarding, the Prosecution does not consider the vessels' motion, whatever it may have been, to be material to its analysis in these circumstances.³¹⁵

Alleged targeting of Palestinians

134. Counsel assert that Palestinian passengers were “singled out and abused”.³¹⁶ In the Response, the Prosecution has previously considered the submission by the Comoros that persons who were “Arab, Turkish or Muslim” were the object of discrimination once ashore.³¹⁷ In the context of all the information available—including the number of nationalities aboard the *Mavi Marmara*, the nature of the treatment to which detainees were generally exposed, and having regard to the relatively small proportion of Palestinian passengers³¹⁸—the Prosecution does not consider that there is a reasonable basis to believe Palestinians were specifically the object of discrimination. Neither of the two instances described by counsel show *arguendo* any mistreatment inflicted upon Palestinians which appears to differ from

³¹⁴ Lightbown report, provided to the Prosecution by the Comoros (*see above* fn.55), p.158.

³¹⁵ *See* Report, paras.40, 94, 105.

³¹⁶ Counsel Observations, paras.13, 28-29, 56 (quoting [REDACTED], [REDACTED], [REDACTED]).

³¹⁷ *See* Response, para.88, fn.206.

³¹⁸ *See* Counsel Observations, para.56 (noting that “5 of us [...] were Palestinian on the Flotilla”). Although the Prosecution is uncertain of the accuracy of this particular figure, it agrees with the general implication of the statement. The passengers on the flotilla as a whole exceeded 700.

that inflicted more generally.³¹⁹ Accordingly, these instances do not materially affect the Prosecution's analysis.³²⁰

Alleged attempted assassination

135. Counsel assert that there is information suggesting that "the IDF attempted to assassinate a prominent Palestinian cleric on board the *Mavi Marmara*".³²¹ Although the Prosecution did receive materials from the victim, [REDACTED], during the preliminary examination, those materials did not make the claim of attempted assassination in the plain terms they are now presented. On the basis of counsel's submissions alone, reporting the new allegations made by [REDACTED] and others, the Prosecution does not consider that there is a reasonable basis to believe that [REDACTED] was the target of an attempted assassination. [REDACTED] retains the option, however, to submit the underlying materials to the Court for consideration under article 15 of the Statute.³²² Accordingly, these instances do not materially affect the Prosecution's analysis.³²³

Alleged declarations of an aim beyond enforcing the blockade

136. Counsel report one victim observing that "[t]here were also a lot of declarations saying that the aim is not to stop the ship but to stop others from doing the same, and to send a message".³²⁴ This victim's statement has not previously been available

³¹⁹ In the first instance, for example, [REDACTED] describes his view that "an English Palestinian passenger" was "kicked by an Israeli soldier for no reason other than because he was Palestinian", that the soldier "knew he was Palestinian and that's why they chose to kick him": Counsel Observations, para.28. To the Prosecution's knowledge, the only relevant Palestinian with UK citizenship was [REDACTED]. In the statements available to the Prosecution, [REDACTED] recalled: "Till that time they didn't know where I was from. I believe they thought I was a Turk, so that they gave me a good beating and kicked me on the head both on the ship and in the helicopter." In an interview, he was specifically asked "Is it because they thought you are a Turk, or because you are an Arab or a Palestinian", and he answered: "No, they didn't know that I am an Arab. They thought I am a Turk." See further Report, paras.63-64, 69, 72; Response, paras.75-78, 88. The Prosecution stresses that, on the basis of the information suggesting mistreatment, it determined that there was a reasonable basis to believe outrages upon personal dignity were committed.

³²⁰ *Contra* Counsel Observations, paraa.56, 58.

³²¹ Counsel Observations, paras.13, 30.

³²² See further above para.128.

³²³ *Contra* Counsel Observations, para.57.

³²⁴ Counsel Observations, para.17 (quoting [REDACTED]). See also paras.53, 62.

to the Prosecution, and the quotation provided by counsel does not explain the timing, source, or content of these declarations. This significantly limits the extent to which the Prosecution can rely on this assertion, and does not materially affect its analysis.

137. To any extent that the “declarations” are intended to refer to the public statements by certain Israeli officials quoted later in the submissions,³²⁵ the Prosecution does not consider that these, in the context of the information previously available, establish a reasonable basis to believe that crimes were committed to “send a message” and hence do not materially affect its analysis.

138. It is acknowledged that the statements reflect the political views of their speakers. Yet none of the statements purports to represent the IDF’s intentions, or their objective understanding of the situation, when executing the interception. Just two of the statements precede the boarding of the flotilla, and neither asserts an ulterior policy motive for the operation, expressly or by implication.³²⁶ The subsequent statements, albeit serving an obvious political agenda,³²⁷ likewise make no such claim.³²⁸ Nor does the court record cited by counsel appear to support the premise asserted.³²⁹ Finally, the records of the “Meir Amit Intelligence and Terrorism

³²⁵ See Counsel Observations, paras.63-69.

³²⁶ See Counsel Observations, para.63 (quoting a statement of Avigdor LIBERMAN on 28 May 2010, and a statement of Danny AYALON on 30 May 2010).

³²⁷ The Prosecution notes counsel’s assertion that these statements “are not to be taken at face value by [the] Prosecutor (as she may have done) when charged with considering this referral” and that they “show that the Situation cries out for proper investigation”: Counsel Observations, para.65. Even if it is true that these statements were “grossly inflammatory”, and hence not reliable for the truth of the matters asserted, the Prosecution does not consider that, on the basis of the information available, they suffice to alter its analysis.

³²⁸ See Counsel Observations, paras.64 (quoting two statements of Avigdor LIBERMAN on 31 May 2010, and a statement of Danny AYALON on 31 May 2010), 66 (quoting a statement of Benjamin NETANYAHU on 31 May 2010), 67 (quoting a press release reporting a conclusion of the Israeli cabinet on 1 June 2010), 68 (quoting a statement of Benjamin NETANYAHU on 2 June 2010).

³²⁹ *Contra* Counsel Observations, para.69 (citing Decision of Israeli Supreme Court, 2 June 2010). The Prosecution cannot locate in this decision an assertion “that it was necessary to use force to protect the IDF soldiers and Israeli citizens”.

Information Center” cited by counsel were reviewed by the Prosecution in the course of the preliminary examination, and not considered to alter its analysis.³³⁰

139. The Prosecution further considers that, although the statements may suggest that some senior politicians perceived an association between the passengers aboard the flotilla and Hamas, they do not materially affect its analysis.³³¹ In particular, there is no information suggesting that any such opinions of those politicians influenced the conduct of the perpetrators reasonably believed to have committed crimes.³³² To the contrary, the information available to the Prosecution suggests that the IDF “were briefed to anticipate resistance to the boarding of the vessels only from ‘peace activists’”.³³³

140. Likewise, the possible description of some of the passengers as “terrorists” in the aftermath of the boarding likewise does not materially affect the Prosecution’s analysis³³⁴—at most, such derogatory comments reflect at least some of the soldiers’ perception of the passengers’ antipathy to Israel, and suspicion about the possible motives of some individuals. In this context, however, the Prosecution also recalls the wide variety of nationalities of the passengers,³³⁵ and the variety of their affiliations. The Prosecution notes the submission that the “Israeli authorities and the IDF have consistently had a policy of targeting those from the international community who seek to oppose the blockade of Gaza and bring aid to those in

³³⁰ See Counsel Observations, para.63 (third bullet point).

³³¹ *Contra* Counsel Observations, para.69.

³³² See Response, para.62 (recalling that the Prosecution’s analysis did not support the view that there was a reasonable basis to believe that senior IDF commanders and Israeli leaders were responsible as perpetrators or planners of the apparent war crimes).

³³³ See Report, para.106 (citing Turkel Report, para.132, fn.518).

³³⁴ *Contra* Counsel Observations, paras.58-61. The Prosecution notes that most of the victims quoted in fact considered themselves to be “treated” like “criminals” or “terrorists”; only [REDACTED] asserts that passengers were generally described as terrorists, a term by which she was also described in [REDACTED]. [REDACTED] is quoted as being asked why he was “acting as a terrorist to break the blockade”.

³³⁵ *Contra* Counsel Observations. See above fn.318.

Gaza”³³⁶ but did not find a reasonable basis to believe such a policy was relevant to or applicable in this situation.

Alleged live fire prior to the boarding

141. Counsel reiterate the claim made by the Comoros that IDF forces started to fire live ammunition before the boarding commenced.³³⁷ Although statements for some of these victims making these assertions have not previously been available to the Prosecution,³³⁸ the Report acknowledged “significantly conflicting accounts of when live ammunition was first used and from where it emanated” and the possibility that live fire commenced before boarding.³³⁹ The Prosecution does not consider that this possibility, even if established, would have altered its analysis.³⁴⁰

142. Counsel also describes a victim who, at a time before he thought the *Mavi Marmara* had been boarded, found a man who had been shot in the stomach, and who concluded “due to the direction of entry of the bullets into the man’s stomach” that “the shots must have been coming from another ship.”³⁴¹ Although the Prosecution has not previously received a statement from this individual, it notes that his testimony was provided to the Turkish commission of inquiry whose report was considered in the preliminary examination.³⁴² A similar account is also provided in materials which were available to the Prosecution, and formed part of its

³³⁶ Counsel Observations, para.50.

³³⁷ See Counsel Observations, para.19.

³³⁸ Counsel rely primarily on the observations of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]: see Counsel Observations, para.19, fns.27-34.. Of these victims, the Prosecution has not previously received statements or similar information from [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. With respect to [REDACTED], the Prosecution had previously received only a “summary” of information: see Response, para.90, fn.212.

³³⁹ Report, para.41; Response, paras.80-82.

³⁴⁰ See above paras.49, 54; Response, para.83.

³⁴¹ Counsel Observations, para.20 (quoting [REDACTED]).

³⁴² See e.g. above paras.51-52.

analysis.³⁴³ This further information thus does not materially affect the Prosecution's analysis.

Alleged significant gunfire

143. Counsel note victims' recollections of the noise and chaos of the boarding operation, characterised by their perception of "shooting from everywhere".³⁴⁴ Although the Prosecution has not previously received a statement from these particular individuals, this information is entirely consistent with the information considered in the preliminary examination, noting that the IDF used means and methods to confuse and disorient (such as 'flash-bang' grenades), and both lethal and less-lethal weapons (including live gunfire, and less-lethal 'beanbag' and paintball rounds) to deliver both lethal and non-lethal force.³⁴⁵ It is also uncontested that the IDF encountered violent resistance in boarding the *Mavi Marmara*.³⁴⁶ This further information thus does not materially affect the Prosecution's analysis.

Alleged attacks after surrender

144. Counsel report victims stating that passengers aboard the *Mavi Marmara* continued to be attacked after they had surrendered.³⁴⁷ They also quote a victim who is the widow of a man allegedly shot while assisting the injured to obtain medical attention.³⁴⁸ Although the Prosecution has not previously received a statement from some of these individuals,³⁴⁹ all this information is consistent with the information

³⁴³ The Turkish Report, for example, noted accounts of injuries sustained before passengers believed the boarding had started: Turkish Report, pp.22-23. In its analysis, however, the Prosecution exercised caution with regard to witnesses' perception of the relative timing of events. *See above* para.141, fn.339 (recalling the Report's acknowledgement of significantly conflicting accounts of when live ammunition was first used, and the possibility that live fire commenced before boarding). *See also* Response, paras.80-82.

³⁴⁴ Counsel Observations, paras.22-23 (quoting [REDACTED], [REDACTED], [REDACTED]).

³⁴⁵ *See e.g.* Report, para.41; Response, paras.80, 82.

³⁴⁶ *See e.g.* Report, paras.40-41.

³⁴⁷ Counsel Observations, para.24 (quoting [REDACTED], [REDACTED], [REDACTED], and [REDACTED], and [REDACTED]).

³⁴⁸ Counsel Observations, para.25 (quoting [REDACTED]). A statement by this person was included in the materials available to the Prosecution.

³⁴⁹ The Prosecution has not previously received statements or similar information from [REDACTED], [REDACTED], or [REDACTED].

considered in the preliminary examination and expressly noted in the Report.³⁵⁰ It was in this context, among others, that the Prosecution determined there was a reasonable basis to believe the crime of wilful killings had been committed.³⁵¹ This further information thus does not materially affect the Prosecution's analysis.

Alleged existence of a list identifying passengers aboard the Mavi Marmara

145. Counsel state that, after the *Mavi Marmara* had been secured, the IDF were seen to have a list identifying passengers by names and photographs, including the Palestinian passengers.³⁵² This information was already included in the materials available to the Prosecution.³⁵³ These included photographed images of a list, which may be the same one, apparently identifying approximately twenty persons believed to be on the flotilla.³⁵⁴ Those persons were not united by nationality or ethnicity, nor were they all aboard the *Mavi Marmara*. In this context, there is no reasonable basis to believe that the list identified persons to be targeted for crimes.³⁵⁵

146. Although the specific assertion that passengers were summoned by name may be new,³⁵⁶ it is not surprising in the context of the possible existence of the list. Nor does the Prosecution consider that the questioning of some or all of the passengers *per se* was necessarily inconsistent with lawful treatment in the context of the violent

³⁵⁰ See e.g. Report, para.59 (“The autopsy report and some witness accounts further suggest that this latter individual was already lying on the ground when the fatal shot was delivered. There is also information available suggesting that another man killed was engaged in helping to bring injured passengers inside the ship to be treated around the time when he was shot. Additionally, one witness claims that even after he and others waved white flags to indicate their surrender, IDF soldiers continued shooting and subsequently at least two men were shot and killed. Similarly, according to other witness statements, IDF soldiers kept shooting even after attempts had been made to surrender and/or individuals were already wounded”, citing HRC Report, para.123, Turkish Report, pp.26, 128, Palmer-Uribe Report, para.126, and materials provided by the Comoros).

³⁵¹ See Report, para.61.

³⁵² Counsel Observations, para.27.

³⁵³ For example, [REDACTED] described one passenger taking from a captured IDF soldier a set of laminated cards with photos of some of the people aboard the flotilla, as well as floor plans and boat specifications.

³⁵⁴ See Lightbown report, provided to the Prosecution by the Comoros (*see above* fn.55), pp.219-223. Although the resolution of the photos reproduced in the document is poor, Mr Lightbown suggests that the list includes, variously, “[REDACTED]”.

³⁵⁵ *Contra* Counsel Observations, paras.26-30.

³⁵⁶ Counsel Observations, para.27.

resistance that had taken place.³⁵⁷ Accordingly, this information does not alter the Prosecution's analysis.

Alleged deliberate denial of medical treatment

147. Counsel present the victims' views that medical treatment was deliberately denied or impeded by the IDF soldiers after the *Mavi Marmara* had been secured,³⁵⁸ and that the information they present has been "overlooked by the Prosecutor".³⁵⁹

148. In its preliminary examination, the Prosecution had concluded that there is no reasonable basis to believe that the mistreatment of passengers included the deliberate denial of medical treatment.³⁶⁰ This followed from the information in its possession that, although there may have been initial delays in the effective provision of medical treatment, IDF soldiers did then provide such treatment.³⁶¹ The Prosecution's analysis must also be seen in the context of the evidence of the strict regime implemented to control the passengers aboard the *Mavi Marmara*, and the finding that there was a reasonable basis to believe some passengers were mistreated by IDF soldiers in that time.³⁶² The Prosecution notes that claims relating to abuse or rough treatment of wounded passengers would already fall within this latter finding.³⁶³

149. The Prosecution has not previously received a statement from some of the individuals now quoted by counsel,³⁶⁴ although it has received statements from

³⁵⁷ Counsel Observations, para.60.

³⁵⁸ Counsel Observations, paras.32-39 (quoting, relevantly, [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED]).

³⁵⁹ Counsel Observations, para.39.

³⁶⁰ Report, para.68.

³⁶¹ Report, para.67 (citing Turkish Report, pp.28, 30-31; HRC Report, paras.130-132; Turkel Report, pp.172-175; Palmer-Uribe Report, para.144).

³⁶² Report, para.64.

³⁶³ See Counsel Observations, para.38 (quoting [REDACTED], [REDACTED], [REDACTED]). Although the Prosecution has not previously received a statement by [REDACTED], it has previously received material from [REDACTED] containing this allegation.

³⁶⁴ The Prosecution has not previously received statements or similar information from [REDACTED], [REDACTED], or [REDACTED].

others.³⁶⁵ Some victims now may make new or more specific allegations which were not previously mentioned; others make claims which are the same as or similar to those already analysed.³⁶⁶

150. Although the quotations presented in counsel's submissions are deprived of relevant context, the Prosecution notes that some appear to relate to the period of time before the IDF had secured the *Mavi Marmara*.³⁶⁷ Others make absolute claims which are likely to be outside the person's individual knowledge, and which are inconsistent with other available information.³⁶⁸

151. For all these reasons, the Prosecution does not consider that its previous analysis of this issue is altered by counsel's submissions, nor that those aspects of this information which were in its possession were overlooked. It does note, however, that the relevant victims retain the option to submit the underlying materials to the Court for consideration under article 15 of the Statute.³⁶⁹

Alleged mistreatment of detained passengers

152. Counsel recite the victims' accounts of mistreatment suffered by passengers while detained.³⁷⁰ Although the Prosecution has not previously received a statement from some of these individuals,³⁷¹ it considered and expressly referred to all these

³⁶⁵ For example, [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

³⁶⁶ For example, in [REDACTED] published interview, the Prosecution notes her apparent recollection that she *did* enter a room where the wounded were gathered (*see* Counsel Observations, para.34), while not mentioning a diabetic passenger suffering due to denial of access to medicine (*see* Counsel Observations, para.35) or of IDF soldiers "shouting [...] every time" the passengers sought to help the wounded or of "seeing blood flowing out of their wounds spreading everywhere on the ship" (*see* Counsel Observations, para.36).

³⁶⁷ *See e.g.* Counsel Observations, paras.33, 37.

³⁶⁸ *See e.g.* Counsel Observations, para.34 (quoting [REDACTED], "The Israeli soldiers didn't help any of our wounded especially the ones who received deadly injuries leaving them to die"). *But see above* fn.140 (citing the report of the UN Human Rights Council, which noted that medical treatment, including 14 field surgeries, was provided by IDF soldiers, albeit subject to delays and with some reports of rough treatment).

³⁶⁹ *See further above* para.128.

³⁷⁰ Counsel Observations, paras.42-46 (quoting [REDACTED], [REDACTED]).

³⁷¹ The Prosecution has not previously received statements or similar information from [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], or [REDACTED].

same kinds of mistreatment in the Report,³⁷² which formed the basis for its finding that there was a reasonable basis to believe outrages upon personal dignity were committed.³⁷³ This mistreatment included being handcuffed for extended periods;³⁷⁴ being hooded;³⁷⁵ exposure to the elements;³⁷⁶ denial of access to toilet facilities;³⁷⁷ physical harassment including beating or assault;³⁷⁸ verbal harassment;³⁷⁹ the aggressive use of dogs;³⁸⁰ and being forced to kneel for extended periods.³⁸¹ The Prosecution notes that, although it had previously reviewed statements by [REDACTED] concerning the circumstances of her search, counsel now appears to present some new details.³⁸² However, in all the circumstances, the Prosecution does not consider that these additional details suffice to alter its analysis.

153. The Prosecution notes that some accounts of mistreatment appear to relate to conduct ashore, once the passengers had been removed from the *Mavi Marmara*.³⁸³ Although similar allegations were noted in the preliminary examination, they did not form part of the analysis due to their location outside the Court's jurisdiction.³⁸⁴

³⁷² See Report, para.64. See also Response, paras.75-77.

³⁷³ Response, para.71.

³⁷⁴ See Counsel Observations, para.42 (in fn.91, quoting [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED]; in bullet points, quoting [REDACTED]). See also para.46. But see Response, para.78.

³⁷⁵ See Counsel Observations, para.42 (in fn.91, quoting [REDACTED]; in bullet points, quoting [REDACTED]).

³⁷⁶ See Counsel Observations, para.42 (in fn.91, quoting [REDACTED]; in bullet points, quoting [REDACTED]).

³⁷⁷ See Counsel Observations, para.42 (in fn.91, quoting [REDACTED]).

³⁷⁸ See Counsel Observations, para.42 (in fn.91, quoting [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED]; in bullet points, quoting [REDACTED]).

³⁷⁹ See Counsel Observations, paras.42 (in fn.91, quoting [REDACTED], [REDACTED]; in bullet points, quoting [REDACTED]), 44 (quoting [REDACTED], [REDACTED]). See also Response, para.77.

³⁸⁰ See Counsel Observations, para.42 (in bullet points, quoting [REDACTED]). See also para.46.

³⁸¹ See Counsel Observations, para.42 (in bullet points, quoting [REDACTED]).

³⁸² See Counsel Observations, para.45. In her previous statements, the individual reported that she was photographed after the conclusion of the search, that the male soldier did in fact ultimately leave when requested (prior to the commencement of the search), but that she felt insulted and humiliated.

³⁸³ See Counsel Observations, paras.42 (in fn.91, quoting [REDACTED]; in bullet points, quoting [REDACTED], [REDACTED], [REDACTED]), 46 (quoting *inter alia* [REDACTED]). The alleged conduct (verbal and physical harassment, including beating or assault) is consistent with the conduct considered aboard the *Mavi Marmara*.

³⁸⁴ See Response, para.88.

154. Counsel also repeat the Comoros' claim that passengers aboard other ships were also abused.³⁸⁵ As the Prosecution noted in its Response, it had taken into account that force was also used on other vessels,³⁸⁶ but there is no information supporting the allegation that mistreatment or force occurred on all seven vessels of the flotilla.³⁸⁷

Alleged desecration of bodies

155. Counsel assert that two bodies of persons killed aboard the *Mavi Marmara* may have been desecrated.³⁸⁸ This allegation has not previously been considered in the preliminary examination. A statement and an interview by [REDACTED] were both reviewed by the Prosecution; neither of those materials contained the allegation that [REDACTED] body was bitten by dogs after he was killed and before she saw it again.³⁸⁹ The Prosecution has not previously received a statement from [REDACTED], who reports that he was told by unidentified witnesses that [REDACTED] body was kicked and urinated upon after his death. The Prosecution does not consider that these accounts, although highly distressing, alter its analysis—although they may potentially constitute further instances of outrages upon personal dignity under article 8(2)(b)(xxi) of the Statute.³⁹⁰ The Prosecution has already found a reasonable basis to believe that this offence was committed.³⁹¹ The relevant victims of course retain the option to submit the underlying materials to the Court for consideration under article 15 of the Statute.³⁹²

³⁸⁵ Counsel Observations, para.47.

³⁸⁶ Response, para.90 (citing Report, para.78).

³⁸⁷ See Response, paras.91-93. In general, no or very minimal harm appears to have been inflicted on the *Defne*, *Gazze I*, or *Rachel Corrie*.

³⁸⁸ Counsel Observations, para.43 (quoting [REDACTED], [REDACTED]).

³⁸⁹ The Prosecution notes, however, a statement in its possession in which this witness described seeing dogs' faces with blood on, and "wonder[ing]" if the dogs had attacked the wounded or the corpses.

³⁹⁰ See e.g. Elements of Crimes, Article 8 (2) (b) (xxi): War crime of outrages upon personal dignity, element 1, fn.49 (expressly noting that, "[f]or this crime, 'persons' can include dead persons").

³⁹¹ Response, para.71.

³⁹² See further above para.128.

Conclusion

156. As these proceedings have continued, they have—understandably—focused more and more on the factual *minutiae* of each and every allegation which has been made concerning the events aboard the *Mavi Marmara* and other vessels in 2010. This tendency is especially marked as the OPCV and counsel, not improperly, have sought to present the experiences and beliefs of individual victims.

157. But the core issues for the Pre-Trial Chamber's review remain larger and more forensic: was the Prosecution incorrect in the law it applied in the Report? Was it unfair, or did it disregard relevant information? Or was its conclusion that any potential case arising from this situation would be inadmissible at this Court so unreasonable that no reasonable person could have made it? Returning to these questions is appropriate because it gives effect to the special mandate given to this Court in the Statute. Nor does it prevent the Court, if it chooses, from joining with the Prosecution in urging the investigation and, as appropriate, prosecution by relevant authorities of the serious crimes reasonably believed to have been committed aboard the *Mavi Marmara*.

158. For the reasons above, and those previously set out in the Response, the Request should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 14th day of July 2015

At The Hague, The Netherlands