Public

Annex 1

SITUATION ON REGISTERED VESSELS OF THE UNION OF THE COMOROS, THE HELLENIC REPUBLIC OF GREECE, AND THE KINGDOM OF CAMBODIA (ICC-01/13)

Final decision of the Prosecution
concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA),
dated 6 November 2014

with

Public Annexes A-C, E-G and Confidential Annex D

29 November 2017

Introduction

1. Under rule 108(3) of the Rules of Procedure and Evidence, the Prosecution hereby issues its "final decision" concluding the preliminary examination of the situation on registered vessels of the Union of the Comoros, the Hellenic Republic of Greece, and the Kingdom of Cambodia. This final decision is issued pursuant to the Pre-Trial Chamber's request ("Request"), under article 53(3)(a) of the Rome Statute, for the Prosecution to reconsider its original report ("Report"). The conclusions of this final decision are based on the outcome of that reconsideration.

2. Having carefully analysed the Request, the Report, and the other information available, the Prosecution remains of the view that there is no reasonable basis to proceed with an investigation under article 53(1) of the Statute. As such, an investigation may not be initiated, and the preliminary examination must be closed.[1] A 'decision not to investigate' is no less consistent with the Prosecution's mandate under the Statute than a 'decision to investigate'.[2] To be clear, the Prosecution will investigate and prosecute when it properly considers the Statute permits and/or requires it to do so. This is the mandate given by the States Parties in article 53.

3. The Prosecution regrets that it cannot concur in much of the Request's analysis. As the Appeals Chamber has since emphasised, the Request is non-binding and does not fetter the Prosecution's exercise of discretion under rule 108(3). The Appeals Chamber also emphasised that the Prosecution's independent reconsideration will constitute the "final decision" on the matter.[3] To this extent, requests to the

[1] Bergsmo et al, p. 1378, mn. 40 ("In reconsidering the decision, the Prosecutor would be guided by the same considerations contained in paragraphs 1 or 2 of article 53. The decision arrived at would then be delivered pursuant to a paragraph 3 review. This would mean that it could not be said that the decision upon reconsideration was a decision under paragraphs 1 or 2. As such, neither the Security Council nor the referring State Party would be entitled to request a further review"). For long citation of all references, see glossary in Annex A.
[2] *See* Request, para. 51.
[3] Appeals Chamber Decision, paras. 50, 56, 59 ("[I]n the event that, upon review, the Pre-Trial Chamber disagrees with the findings or conclusions of the Prosecutor, it may request reconsideration of that decision. Rule 108(3) […] then provides that the 'final decision' is for the Prosecutor"). In its analysis, the Appeals Chamber quoted with approval: Brady, p. 579 ("if after reconsidering the issue, the Prosecutor *still* decides not to

Prosecution under article 53(3)(a) impose an obligation only of *process*, and not of result.[4]

4. Out of an abundance of caution—and mindful of the general interest, wherever possible, in respecting the legal reasoning of judicial orders and decisions of the Court, notwithstanding the unique circumstances of article 53(3)(a)—the Prosecution sought to appeal the Request and thus to seek independent confirmation of the applicable law.[5] Considering that the Appeals Chamber has confirmed that it lacks jurisdiction to hear such an appeal, the Prosecution has assessed for itself the merits of the Request in undertaking its reconsideration. Indeed, the Appeals Chamber emphasised that the Prosecution "retains ultimate discretion over how to proceed".[6] Moreover, since the Prosecution is obliged by the Statute to "act independently as a separate organ of the Court",[7] it can only act *either* for reasons which the Prosecution itself considers well founded *or* pursuant to a lawful binding order under the Statute. Where the Court has no power to make such a binding order, as now, the Prosecution may act only on the basis of its own independent view of the law and the facts.

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investigate or prosecute, that is the end of the matter", emphasis supplied)); Bergsmo and Kruger, p. 1075 ("[Article 53(3)(a) of the Statute] is silent on whether the Prosecutor is bound by a request of the Pre-Trial Chamber. The intention of the provision, however, is not to infringe on the independence of the Prosecutor. Whilst the Prosecutor will indeed be bound to reconsider his or her decision not to investigate or prosecute, he or she would not strictly speaking be obliged to come to a different conclusion. If the reconsideration would lead to the same conclusion as before, this would be a permissible exercise of prosecutorial independence, provided the Prosecutor had properly applied his or her mind in coming to the conclusion"). *See also* Bergsmo et al, p. 1378, mn. 39; Schabas, pp. 829, 842; Bitti, pp. 1214-1215 ("*la Chambre préliminaire ne peut que demander au Procureur de revoir sa décision: c'est en effet le Procureur qui conserve le dernier mot! L'examen de la décision du Procureur par la Chambre préliminaire aboutit donc à une simple recommandation*").

[4] Appeals Chamber Decision, para. 59 ("the Prosecutor is obliged to reconsider her decision not to investigate, but retains ultimate discretion over how to proceed").

[5] *See e.g.* Notice of Appeal. The Prosecution sought to appeal the Request under article 82(1)(a) of the Statute (concerning "[a] decision with respect to jurisdiction or admissibility"). For similar reasons emphasised by the Appeals Chamber in its decision ruling such an appeal inadmissible, and relating especially to the Prosecutor's unfettered discretion under the Statute in reaching her final decision under rule 108(3), the Prosecution did not consider that an appeal under article 82(1)(d) (concerning a decision involving "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial") would be apposite. *See also* Bitti, p. 1216.

[6] Appeals Chamber Decision, para. 59.

[7] Statute, art. 42(1).

5. Furthermore, although the progress of the litigation before the Pre-Trial Chamber led to increasing focus on the factual *minutiae* of the allegations concerning the events aboard the *Mavi Marmara*,[8] the Prosecution remains convinced that is not the proper focus of review under article 53(3) of the Statute. Rather, the focus should be whether the Prosecution, in its original article 53(1) determination, correctly applied the law, acted fairly, and reasonably assessed the available information. The Prosecution's reconsideration has been conducted on such a basis.

6. The Prosecution further notes that Counsel for the Comoros and the participating victims, both before the Pre-Trial Chamber and in private communications, have asserted that new facts and information have become available *since* the publication of the Report. Notwithstanding the merits of the Request, such new facts or information *may* independently justify the Prosecution's exercise of discretion under article 53(4) to reconsider a decision whether to investigate.[9] Yet having analysed these claims, however, the Prosecution does not consider that the new facts or information require or justify departure from the conclusions in the Report.

7. Although for these reasons the preliminary examination of this situation is now closed, the Prosecution reaffirms that, in accordance with article 53(4) of the Statute, it "may" at any time reconsider its decision, based on new facts or information.

Reasoning

8. This final decision addresses three core issues. Given the extensive analysis in the Report, this final decision addresses factual matters only to the extent necessary to provide "the reasons for the conclusion", as required by rule 108(3).

[8] *See further* Prosecution Response to Victims, paras. 156-157.
[9] In this regard, one relevant factor will include whether the newly available material contains information or allegations which are new, or whether the newly available material is duplicative of material previously taken into consideration.

- First, whether the reasoning in the Request discloses a well founded basis to reach a different conclusion than that contained in the Report.

- Second, in any event, whether the Prosecution considers there is a well founded basis to reach a different conclusion than that contained in the Report based, among other factors, on the arguments raised by the Comoros and the victims before the Pre-Trial Chamber.

- Third, and finally, whether there is a well founded basis to reach a different conclusion than that contained in the Report based on any new facts or information which have become available since publication in November 2014.

9. The Prosecution concludes that there remains no reasonable basis to proceed with an investigation of this situation.

10. The Prosecution reaffirms, however, that there is a reasonable basis to believe that war crimes were committed by some members of the Israel Defence Forces ("IDF") during and after the boarding of the *Mavi Marmara* on 30 May 2010.

11. Although the Prosecution maintains its view that no potential case arising from this situation would be admissible before this Court—which is the only issue in dispute with the Comoros—this does not excuse any crimes which may have been perpetrated.

I. On the basis of the Request, there is no reasonable basis under the Statute to proceed with an investigation

12. As previously explained, in order to determine whether the conclusions in the Report should be altered in light of the reasoning in the Request, it is necessary to examine the merits of that reasoning. Intrinsic to the Request were the Pre-Trial

Chamber's own view of the law governing preliminary examinations and its own view of the facts at issue.[10]

13. Based on its independent analysis of the law, the Prosecution cannot concur with the majority of the Pre-Trial Chamber. In particular, it respectfully disagrees with the legal reasoning in the Request concerning: the standard applied by the Prosecution under article 53(1), the standard of review applied by the Pre-Trial Chamber under article 53(3), and the considerations relevant to the substantive analysis carried out by the majority. In such circumstances, having regard to the Prosecution's independent mandate and the nature of its reconsideration under article 53(3) and rule 108, it must consider these matters afresh and cannot simply follow the approach of the Request.

14. The Prosecution further considers that a clear articulation of its legal understanding, and the nature and extent of its respectful difference with the majority's analysis, is important. The approach taken in the Request may be far-reaching in its potential consequences.[11] Given the nature of the procedures under articles 15 and 53, there is no obvious forum for the Prosecution and Pre-Trial Chamber to resolve and reconcile any differences in their view of these provisions, except in clearly reasoned submissions such as these. The balance between the Prosecution and the Pre-Trial Chamber in initiating and reviewing decisions to investigate is one of the bedrock principles upon which the Court is built, and is essential to the practical operation of the Prosecution.[12] The intricate negotiations leading to the drafting of these provisions of the Statute underline the importance

[10] *See e.g.* Request, paras. 24, 26, 30, 44-45, 47-48.
[11] The Prosecution notes, for example, the recent subsequent decision of Pre-Trial Chamber I—composed as it was when issuing the Request—authorising an investigation of the situation in Georgia. The Prosecution agrees with the substantive outcome of that decision, concluding unanimously that the requirements of article 53(1) are met for the Georgia situation. However, the Prosecution does not agree with every aspect of the analysis in that decision concerning the standard to be applied under article 53(1), which makes specific reference to the Request as prior authority. *See e.g.* *Georgia* Article 15 Decision, paras. 3, 25, 35. *See also* *Georgia* Article 15 Decision, Separate Opinion of Judge Kovács, paras. 5-7, 10-11, 19-20, 23. *See further below* paras. 52-55.
[12] Appeals Chamber Decision, paras. 59-60.

which States attributed to this issue.[13] When exercising its discretion, the Prosecution may not acquiesce in an interpretation of the Statute, expressly or tacitly, which alters this delicate balance.

I. 1. The Prosecution disagrees with the Request's interpretation of the legal standard under article 53(1)

15. The Request makes four key observations on the legal standard to be applied by the Prosecution under article 53(1) to the effect that:

- article 53(1) is "merely" a test "whether or not an investigation should be opened", which "does not necessitate any complex or detailed process of analysis";[14]

- since "the presumption of article 53(1)" is that "the Prosecutor investigates in order to be able to properly assess the relevant facts", an investigation must be initiated if there is a "plausible explanation[]" or a "reasonable inference" that the criteria in article 53(1)(a) to (c) are met;[15]

- there is no requirement for the information to be clear, unequivocal, or not contradictory,[16] and information must be accepted unless it is "manifestly false";[17] and

- article 53(1)(a) and (b) constitute "exacting legal requirements" and are not discretionary.[18]

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[13] *See e.g.* Fernández de Gurmendi, pp. 183-187; Guariglia, pp. 227-231; Turone, pp. 1138-1139.
[14] Request, para. 13.
[15] Request, para. 13.
[16] Request, para. 13. *See also* paras. 13 ("[f]acts which are difficult to establish, or which are unclear, or the existence of conflicting accounts, are not valid reasons not to start an investigation but rather call for the opening of such an investigation"), 36 ("if […] the events are unclear and conflicting accounts exist, this fact alone calls for an investigation rather than the opposite. It is only upon investigation that it may be determined how the events unfolded").
[17] Request, para. 35.
[18] Request, para. 14.

16. Although the Prosecution agrees that an investigation *shall* be initiated unless there is no reasonable basis to proceed,[19] these observations, jointly and severally, may lead to some misunderstanding of the legal standard which must be applied by the Prosecution under article 53(1). In particular, they appear to overlook significant considerations which must form part of the Prosecution's analysis, and especially the distinction between assessing the reliability of a piece of information and assessing the inference(s) that information may reasonably support in the broader context. The approach in the Request appears to give undue weight to investigation as the remedy to any concerns identified in the Prosecution's analysis, and insufficient weight to the alternative remedy in article 53(4).

I. 1. a. The analysis required by article 53(1) must not be over-simplified

17. The Prosecution does not agree with the Request in two key aspects of its interpretation of article 53(1): it seems to confuse the standard of proof which the Prosecution must apply, and it overlooks the Prosecution's duty to evaluate the available information. The Statute is clear in prohibiting the Prosecution from initiating an investigation when it is not satisfied of a "reasonable basis to proceed", having evaluated the information available.

18. In interpreting the law, consistent with article 21(1)(a) of the Statute and the guidance of the Appeals Chamber, the Prosecution first considers the Statute and the Rules, interpreting their provisions in accordance with the rules applicable to the interpretation of treaties provided in the Vienna Convention on the Law of Treaties.[20]

[19] Statute, art. 53(1). As a consequence of this principle, any conflict between multiple reasonable inferences should be resolved in favour of an investigation. The Prosecution took this position in litigation before the Pre-Trial Chamber: Prosecution Response to Victims, para. 23. This does not remove the obligation to determine by a reasonable process whether those inferences *are* reasonable: *see below e.g.* paras. 19-25.
[20] *See e.g. Ruto and Sang* Summonses Appeal Decision, para. 105.

I. 1. a. i. The standard of proof is a "reasonable basis to proceed"

19. The Request may introduce some confusion into the standard of proof to be applied by the Prosecution under article 53(1). Although it correctly states that a relevant conclusion must be "reasonable",[21] it risks linguistic confusion in observing that a relevant conclusion must be "plausible".[22] Nor does the Prosecution agree that any information, claim, or personal belief which is not "manifestly false" must be presumed to be true.[23] This assertion is not only unsupported, but inconsistent with the Statute. As explained below, this misconception significantly limits the extent to which the Prosecution can follow the reasoning of the majority of the Pre-Trial Chamber.[24] By entertaining 'possible' inferences (in the sense of *any* inference from *any* information or claim which was not manifestly false, considered in isolation rather than in context), the majority interpreted the standard of proof under article 53(1) quite differently from the Report, whatever standard of review was applied.[25] The Prosecution is of the view that this approach is not consistent with the requirements of the Statute.

20. Article 53(1) states that the Prosecutor "shall […] initiate an investigation unless he or she determines that there is no reasonable basis to proceed". The test is met if, applying the law correctly, the available information permits a *reasonable* conclusion that the criteria in article 53(1)(a) to (c) are met. Consistent with the *chapeau* of article 53(1), and the standard in article 53(1)(a), the Prosecution understands that all relevant factual matters must be established to a standard of 'reasonableness', including those arising under article 53(1)(b).

[21] Request, para. 13 ("If the information available […] allows for reasonable inferences […] the Prosecutor shall open an investigation").
[22] Request, para. 13 ("In the presence of several plausible explanations […] the presumption […] is that the Prosecutor investigates").
[23] Request, para. 35 ("it is inconsistent with the wording of article 53(1) […] for her [the Prosecutor] to disregard available information other than when that information is manifestly false"). *See also* *Georgia* Article 15 Decision, para. 25; *Georgia* Article 15 Decision, Separate Opinion of Judge Kovács, paras. 11, 23.
[24] *See below* paras. 33-35.
[25] *See below* paras. 36-68.

21. The Prosecution agrees that the "reasonable basis to believe" standard of article 53(1) is the lowest evidentiary standard in the Statute, and that information meeting this standard need not be comprehensive or conclusive.[26] Nor must the relevant conclusion be the only reasonable one available from the information.[27]

22. However, a "reasonable" conclusion is more than a possible, conceivable, or hypothetical inference. Rather, it is a rational or sensible conclusion based on the totality of the available information. This is apparent from the common usage of the term,[28] the manner in which it has been interpreted by Pre-Trial Chambers of this Court when authorising investigations into the situations in Kenya, Côte d'Ivoire and Georgia,[29] academic commentators,[30] and more generally by other international courts and tribunals.[31] Individual judges have likewise expressly cautioned that the article 53(1) test is not met by "any information", or a "generous", "summary" or "fragmentary" analysis of that information.[32]

[26] *Kenya* Article 15 Decision, para. 27; *Côte d'Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, para. 31; *Georgia* Article 15 Decision, para. 25.
[27] *Kenya* Article 15 Decision, paras. 33-34 (citing *Al Bashir* Appeal Decision, para. 33); *Georgia* Article 15 Decision, para. 25. *See also* *Al Bashir* Appeal Decision, paras. 34-39. This latter decision was made in the context of article 58 of the Statute, but its reasoning may be applied equally to article 53(1).
[28] *OED Online* (OUP, June 2015), "reasonable, adj.", A.4.a ("in accordance with reason; not irrational, absurd or ridiculous"), S2 ("based on specific and objective grounds").
[29] *See e.g.* *Kenya* Article 15 Decision, paras. 30 ("reasonable means "'fair and sensible', or 'within the limits of reason'"), 35 (article 53(1), in the context of article 15(4), requires "a sensible […] justification for a belief"). *See also* para. 33 ("it is sufficient" that a conclusion "can be supported on the basis of the […] information available"). *See also* *Côte d'Ivoire* Article 15 Decision, para. 24; *Georgia* Article 15 Decision, para. 25; *Georgia* Article 15 Decision, Separate Opinion of Judge Kovács, para. 11.
[30] Pikis, pp. 104 (mn. 256: "good reason"), 264 (mn. 624: "fair[] infer[ence]"), 268 (mn. 636); Bergsmo et al, p. 1370, mn. 12 ("due consideration"); Bergsmo and Kruger, p. 1069, mn. 12 ("due application of [the Prosecutor's] mind").
[31] In the context of the 'beyond reasonable doubt' standard, *see* ICTR, *Rutaganda* AJ, para. 488 (a reasonable possibility is "based on logic and common sense" and has "a rational link to the evidence, lack of evidence, or inconsistencies in the evidence"; it is not "imaginary or frivolous […] based on empathy or prejudice"); ICTY, *Mrkšić* AJ, para. 220 ("a fair or rational hypothesis which may be derived from the evidence" and not any "hypothesis or possibility"); *Galić* AJ, para. 259 ("just because there is some possibility, however slight, that an incident could have happened in another way does not in itself raise reasonable doubt"). This Court's Appeals Chamber has cited *Rutaganda* with approval: *Ngudjolo* AJ, para. 109; *Ngudjolo* AJ, Dissenting Opinion of Judges Trendafilova and Tarfusser, paras. 54-57.
[32] *See e.g.* *Kenya* Article 15 Decision, Dissenting Opinion of Judge Kaul, para. 15; *Côte d'Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, para. 43; *see also* *Georgia* Article 15 Decision, Separate Opinion of Judge Kovács, para. 6.

23. The drafting history of the Statute also confirms that the standard in article 53(1) excludes mere 'possibilities'. Thus, the Preparatory Committee in 1997 rejected the International Law Commission's proposal that "the Prosecutor shall initiate an investigation unless the Prosecutor concludes that there is *no possible basis* for a prosecution",[33] and proposed instead a 'reasonableness' standard.[34] Likewise, in 1998, the Preparatory Committee observed (in the context of then article 59, "Arrest", of its 1998 draft) that "reasonable grounds […] embody objective criteria."[35] During the diplomatic negotiations at Rome, the delegates refrained from making any substantive modification to the standard in article 53(1).[36]

24. In this context, the Prosecution does not agree with the majority's conclusion that the Prosecution must accept as true (for the purpose of a preliminary examination) any information or claim which is not "manifestly false".[37] This seems to mistake the function of article 53(1), treating it as a standard which controls the reception and interpretation of individual pieces of information (a 'screening' standard) rather than a standard which governs the conclusions which are reached (a 'result' standard). The Prosecution does not consider that this is correct. Article 53(1) requires a result standard, in the sense that the Prosecution must be satisfied of a "reasonable *basis to proceed* under the Statute", including the criteria in article 53(1)(a)

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[33] *See* Bassiouni, p. 363 (reproducing article 26 of the ILC's *Draft Code of Crimes against the Peace and Security of Mankind*).
[34] *See* Bassiouni, pp. 348 (reproducing the Preparatory Committee's 1997 draft, article 26, requiring an investigation "unless the Prosecutor concludes that there is no reasonable basis"), 354 ("reproducing the Preparatory Committee's 1996 draft, article 27, requiring determination "whether the complaint provides or is likely to provide a [possible] [reasonable] basis"). *See also* Bergsmo and Kruger, p. 1069, mn. 11.
[35] Preparatory Committee Report, p. 86, fn. 10.
[36] *See* Bassiouni, pp. 337 (reproducing the Drafting Committee's 1998 draft, article 54, which was the result of the diplomatic negotiations at Rome, stating that "[t]he Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed"), 338 (reproducing the Preparatory Committee's 1998 draft, article 54, which was the basis for the diplomatic negotiations, stating that "the Prosecutor shall […] initiate an investigation unless the Prosecutor concludes that there is no reasonable basis for a prosecution", accompanied by a note: "The term 'reasonable basis' in the opening clause is also used in the criteria listed in paragraph 2(i). If the latter is retained, a broader term in the opening clause might be necessary in order to cover all the criteria listed under paragraph 2").
[37] Request, para. 35 ("it is inconsistent with the wording of article 53(1) of the Statute and with the object and purpose of the Prosecutor's assessment under this provision for her to *disregard available information* other than when *that information is manifestly false*", emphasis added).

to (c). Indeed, consistent with other standards of proof under the Statute,[38] it may be legally erroneous to apply the article 53(1) standard to individual pieces of information in isolation.

25. The problem in trying to apply article 53(1) as a screening standard is further confirmed by the apparent circularity of the logic which ensues. Although it is correct that, *if* there is a reasonable basis to proceed, the Prosecution *shall* initiate an investigation (the result standard), the Request suggests that *any* contradictions or inconsistencies in the available information—which do not rise to the level of making the information "manifestly false" but which prevent the result standard being met—*likewise* militate in favour of investigation.[39] In other words, the Prosecution should investigate to determine whether it is permitted to investigate. The Prosecution doubts this logic for the following reasons.[40]

- First, this logic overlooks the distinction between minor contradictions or inconsistencies which, nonetheless, still allow one (or more) reasonable inference(s) to be drawn,[41] and contradictions or inconsistencies which are so fundamental that they prohibit any resulting inference from being reasonable at all.

- Second, this logic makes the test in article 53(1) virtually redundant—any referral to the Court supported by information which is not "manifestly false" would require investigation. This is inconsistent with the scheme of the Statute, which clearly envisages the initiation of investigations based on the positive outcome of a distinct and self-sufficient preliminary examination

[38] By analogy, *see e.g.* *Ngudjolo* AJ, Dissenting Opinion of Judges Trendafilova and Tarfusser, paras. 34 ("It follows, *a contrario*, that individual pieces of evidence should not be subject on their own to the 'beyond reasonable doubt' standard"), 40-41.
[39] Request, paras. 13, 36. *See also* paras. 30, 38, 43. *See also* *Georgia* Article 15 Decision, para. 25; *Georgia* Article 15 Decision, Separate Opinion of Judge Kovács, paras. 11, 23.
[40] *See also below* paras. 53-55, 158.
[41] In such circumstances, the Prosecution agrees that the reasonable inference *favouring* investigation must be adopted. *See* Prosecution Response to Victims, para. 48.

phase, based on the "information made available". Nothing in the Statute suggests that investigations may be used as a tool to disprove the finding of a preliminary examination that the article 53(1) standard is *not* met.

- Third, given the nature of the Pre-Trial Chamber's analysis under article 15—which likewise requires an overall assessment of whether there is a reasonable basis to proceed—this logic would seem to suggest, incorrectly, that a different standard applies for preliminary examinations of situations considered by the Prosecution *proprio motu* and preliminary examinations of situations referred by a State or the UN Security Council.[42]

- Fourth, this logic does not seem to consider the significance of article 53(4), which necessarily contemplates circumstances where the Prosecution properly determines that the information initially available does not meet the article 53(1) standard.[43] Article 53(4) makes clear that investigation is not the only cure for insufficient or dubious information. Rather, the Prosecution may decline to proceed, while remaining prepared to revisit this decision should the referring entity or other persons obtain and share relevant new facts and information in the future.[44]

- Fifth, this logic seems to understate the significant consequence of initiating an investigation, which creates obligations both for the Prosecution and the Court as a whole, as well, ultimately, as for relevant States. Any investigation requires considerable investment of limited resources and operational assets which may not otherwise be used for other situations under investigation,

[42] *See below* para. 30. The Prosecution notes that, in the recent *Georgia* decision, Pre-Trial Chamber I agreed that "the criteria of article 53(1) of the Statute governing the initiation of an investigation by the Prosecutor equally inform the analysis under article 15(3) and (4) of the Statute". However, the majority may have departed from the previous practice of the Pre-Trial Chambers in the nature of the analysis it considered necessary to conduct. *See e.g.* *Georgia* Article 15 Decision, paras. 3-4, 25; *Georgia* Article 15 Decision, Separate Opinion of Judge Kovács, paras. 1, 5-7, 10-12, 18, 23.
[43] *See also* Schabas, p. 844; Bitti, pp. 1225-1226.
[44] *See e.g.* Prosecutor's Statement concerning Iraq. In that situation, the Prosecutor re-opened the preliminary examination under article 15(6) of the Statute, which is analogous for these purposes to article 53(4).

where the article 53(1) standard *was* clearly met. Thus, although the drafters of the Statute did not expressly include the proper allocation of the Court's resources among the article 53(1) criteria, such considerations cannot be ignored when considering the merits of an expansive reading of article 53(1). Indeed, it may be in precisely this context, at least in part, that the "sufficient gravity" requirement *was* included as an express criterion for initiating any investigation.

I. 1. a. ii. The Prosecution must evaluate the information made available

26. Conceiving article 53(1) as a screening standard (rather than a result standard) may also have led the majority of the Pre-Trial Chamber to conclude that no "complex or detailed process of analysis" is required in conducting a preliminary examination.[45] Respectfully, the Prosecution cannot concur in this view. Not only does the Statute expressly require the Prosecution to evaluate the information made available, but the method for evaluating information remains essentially the same, notwithstanding the varying legal standards to which that analysis ultimately may be directed.[46] This difference of opinion, again, may lead to undue weight being given to individual pieces of information in isolation.

27. Article 53(1) and rule 104(1) expressly condition the Prosecutor's determination whether there is a reasonable basis to proceed under the Statute on an "evaluat[ion]" of "the information made available to him or her", including analysis of "the seriousness of the information received." Similarly, rule 104(2), which permits the

[45] Request, para. 13. This is also the implication of an approach based on "manifest" falsity (*see* para. 35), which means "clear" or "obvious" falsity. *But see above* para. 22 (warning that the low standard under article 53(1) should not be mistaken to mean there is no duty of evaluation). *See also* *Kenya* Article 15 Decision, Dissenting Opinion of Judge Kaul, para. 19 (analysis under article 53(1) is not a "rubber-stamp").

[46] *See e.g.* Klamberg, at 546-547 ("Evaluation of evidence consists of at least three separate steps: (i) evaluation of a single piece; (ii) weighing the totality of the evidence in favour of or against the proposition; and (iii) final evaluation whether the combined evidential value is sufficient to establish the proposition"). *See also e.g.* *Abu Garda* Decision, paras. 8-9 ("neither the Statute nor the Rules […] draws a distinction as to the way evidence shall be assessed before a Trial Chamber and a Pre-Trial Chamber. […] The difference between the various stages of the proceedings lies instead in the threshold of proof to be met during the respective stages of the proceedings").

Prosecution to seek additional information from "*reliable* sources" (emphasis added), also suggests that a preliminary examination should not be based on information the Prosecution considers unreliable.

28. In their ordinary meaning, "evaluation" and "analysis" mean "estimating the force of (probabilities, evidence, etc)"[47] and the "methodical or systematic investigation of something complex in order to […] understand it".[48] Academic commentators agree.[49]

29. Judge Fernández de Gurmendi has further emphasised that preliminary examination is the particular competence of the Prosecution[50] and that this "analysis cannot be conducted in the abstract", although he or she need not identify the relevant facts "exhaustive[ly]".[51] For any such evaluation to be effective, it entails not only an assessment of the *reliability* of individual pieces of information but also their *meaning*. In other words, under article 53(1), the Prosecution must examine the available information, in its totality, to determine what conclusions are reasonably supported and whether the criteria in article 53(1)(a) to (c) are satisfied. Although this evaluation should not be over complicated, it is necessarily both "complex" and "detailed".[52]

30. Indeed, the significance of the Prosecution's duty of evaluation—and the implication that an investigation should not be opened lightly—is also evident from

[47] *OED Online* (OUP, June 2015), "evaluation, n.", 2.
[48] *OED Online* (OUP, June 2015), "analysis, n.", I.1.b.
[49] *See e.g.* Pikis, pp. 262-263 (mn. 623: under article 15(2), identical to rule 104(1), analysing the seriousness of information means examining "the material giving rise to the information, its foundation and reliability"); Turone, p. 1152 (a "rational and objective assessment […] based on objective and specific indicia"); Bergsmo et al (article 15), p. 733, mn. 21 (under article 15, "[t]he Prosecutor's conclusion cannot be arbitrary, but must be reasoned. He or she […] must exercise prosecutorial discretion independently by critically assessing the reliability of the information").
[50] *Côte d'Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, para. 21. *See also* para. 22 (citing *DRC* Appeal Decision, paras. 51-52).
[51] *Côte d'Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, para. 33.
[52] *Contra* Request, para. 13. *See e.g. Kenya* Article 15 Decision, Dissenting Opinion of Judge Kaul, para. 13 ("the Prosecutor must have properly and thoroughly analysed the material received or gathered and must sequentially present his [or her] determinations in a conclusive manner as to whether there is a reasonable basis to proceed with an investigation"). *Cf.* Bitti, pp. 1186, 1192.

a consideration of the broader context of the Statute, and its object and purpose. Thus, the Court "shall be complementary to national criminal jurisdictions",[53] has "limited jurisdiction" and resources,[54] and may not hear cases which are not of sufficient gravity.[55] The practice of the Court under article 15 is particularly instructive when considering the Prosecution's duty under article 53—even though a fundamental distinction must remain between the Pre-Trial Chamber's powers of review under the two provisions.[56] In particular, the Pre-Trial Chamber's inquiry under article 15(4) reflects at least the minimum degree of analysis which must be conducted by the Prosecution under article 53(1),[57] applying the same criteria and standards.[58] To the extent that the Pre-Trial Chamber under article 15(4) evaluates "the relevance and weight of the material" and whether, "as a whole", it "substantiate[s] the main conclusion[s]",[59] the Prosecution must do likewise under article 53(1). As Judge Kaul observed, this means a "full, genuine and substantive determination".[60]

[53] Statute, Preamble, art. 1.
[54] *Kenya* Article 15 Decision, Dissenting Opinion of Judge Kaul, paras. 10 (warning of the danger of expanding the Court's jurisdiction), 17. *See also above* para. 14.
[55] *Kenya* Article 15 Decision, para. 56 ("all crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting, and trying peripheral cases"); *Côte d'Ivoire* Article 15 Decision, para. 201. *See also* Statute, Preamble, art. 1.
[56] *See below* paras. 45-47.
[57] Indeed, the Prosecutor's analysis may still be broader: *see Côte d'Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, paras. 15-16, 18-19, 28, 35-38, 43, 45, 48, 60. *See also* para. 24 (observing that preliminary examinations are "always conducted by the Prosecutor in the same way and considering the same factors").
[58] *Kenya* Article 15 Decision, paras. 21-23 ("The drafting history of article 15 and 53 […] reveals that that the intention was to use exactly the same standard for these provisions"); *Côte d'Ivoire* Article 15 Decision, paras. 18, 21-22. *See also* rule 48.
[59] *Côte d'Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, paras. 37-38. *See also* para. 43. For examples of this approach in practice, *see e.g. Kenya* Article 15 Decision, paras. 70-200; *Côte d'Ivoire* Article 15 Decision, paras. 26-208.
[60] *Kenya* Article 15 Decision, Dissenting Opinion of Judge Kaul, para. 14. *See also* para. 15 (requiring "a serious, thorough and well-considered approach based on the law"). *See further Georgia* Article 15 Decision, Separate Opinion of Judge Kovács, paras. 11-12 (suggesting that the Pre-Trial Chamber when acting under article 15 should provide "a thorough assessment", albeit at the "low evidentiary standard" applicable, and "a clear and well-reasoned decision, which presents a full account of the relevant facts and law").

31. Likewise, the Pre-Trial Chamber's view of its duty under article 15(4) to prevent, among others, "unwarranted" or "frivolous" investigations necessarily also applies to the Prosecution's duty under article 53(1).[61]

32. The drafters of the Statute similarly elected to emphasise the importance of the Prosecution's evaluation of the available information in determining whether to initiate an investigation. Thus, the condition precedent in the *chapeau* of article 53(1) ("having evaluated the information made available") was inserted as a direct consequence of the diplomatic negotiations at Rome.[62] This could not have been inadvertent, and cannot be ignored; it was essential to the structural design of the Rome Statute and the powers granted to the Prosecution.

I. 1. b. Disagreement concerning the correct interpretation of article 53(1) prevents the Prosecution from concurring with the Request

33. Given its disagreement with the majority of Pre-Trial Chamber I's interpretation of article 53(1), which directly affects the correctness of the legal standard applied in the Report, the Prosecution cannot concur in the basic premise of the Request. In particular, rather than considering the totality of the available information, and assessing the conclusions which could "reasonably" be drawn from that totality, the majority seemed to consider that an investigation was required if *any* piece of information, in isolation, permitted a relevant inference. The Prosecution respectfully submits that, had the Pre-Trial Chamber correctly interpreted the legal standard under article 53(1), it would not have issued the Request.

34. One clear example is shown by the majority's conclusion regarding reports of live fire by IDF troops prior to the boarding of the *Mavi Marmara*—an allegation

[61] *See e.g.* *Kenya* Article 15 Decision, para. 32; *Côte d'Ivoire* Article 15 Decision, para. 21; *Côte d'Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, paras. 16-17.
[62] Bassiouni, pp. 337 (reproducing the Drafting Committee's 1998 draft, article 54, which was the result of the diplomatic negotiations at Rome), 338 (reproducing the Preparatory Committee's 1998 draft, article 54, which was the basis for the diplomatic negotiations at Rome). *See also* Bergsmo et al, p. 1367, mn. 3 ("the Diplomatic Conference substantially contributed to what was finally adopted in article 53"); Bitti, p. 1181. *See also above* para. 23.

which it considered "extremely serious and particularly relevant" to the fourth factor of its analysis.[63] In its view, the Prosecution incorrectly "set aside" or "disregard[ed]" this information.[64] Due to its different interpretation of article 53(1), however, the majority confused the Prosecution's assessment of the *specific information* concerning pre-boarding live fire with its assessment, in the context of all the other available information, of *the conclusions which could reasonably be drawn from the totality of the available information*. To the contrary, in applying the article 53(1) standard, the Prosecution's analysis was correct and reasonable.[65]

- The Prosecution gave appropriate weight to the individual accounts of live fire by IDF troops prior to the boarding. It did not simply disregard them or set them aside due to conflicting accounts.[66]

- The Prosecution assessed these individual accounts in the context of all the other available information. This included the equivocal nature of most of the individual accounts alleging live fire prior to the boarding; other individual accounts which made no such allegations; the conduct of the first (failed) boarding attempt without warning; the very brief time between the first and second boarding attempts; the pre-dawn visibility; the nature of the *Mavi Marmara*; and the chaos once the boarding commenced.[67]

- Critically, even if the Prosecution had given greater weight to the "possibl[e]" pre-boarding live fire, *arguendo*, this would still not have established sufficient gravity. Rather, it would have remained one factor among all the available

[63] Request, para. 36.
[64] Request, para. 35. The majority of the Pre-Trial Chamber in this respect appears to have misapprehended or mischaracterised the Prosecution's submission to it: *see below* para. 94.
[65] The Prosecution notes that this degree of analytical detail was not required in the Report: see Prosecution Response to Comoros, paras. 20, 23; Prosecution Response to Victims, paras. 56-60. Previous elaborations of the Prosecution's reasoning in this respect have been responsive to allegations by the Comoros and the victims in litigation before the Pre-Trial Chamber.
[66] *See e.g.* Report, para. 41; Prosecution Response to Comoros, para. 81; Prosecution Response to Victims, paras. 48-49, 54 (first bullet point), 66, 141-142.
[67] *See e.g.* Report, para. 105; Prosecution Response to Comoros, para. 82. *See also below* paras. 107-123.

> information relevant to considering whether a plan or policy could reasonably be inferred[68]—which, itself, is just one factor relevant to the gravity assessment as a whole.

35. The Request considers none of these analytical stages, but instead simply gives weight to an alarming allegation considered in isolation. Had it applied the correct standard, its analysis would have been substantially different.

I. 2. The Prosecution disagrees with the Request's interpretation of the standard of review under article 53(3)(a)

36. Beyond its concern regarding the proper interpretation of the legal standard under article 53(1), the Prosecution also disagrees with the approach to the standard of review under article 53(3)(a). The Request conducted a *de novo* review—measuring the opinion of the Prosecution against the opinion of the Pre-Trial Chamber, without deference—when this was neither permitted by the Statute nor indeed feasible without scrutinising the primary information gathered in the preliminary examination.

37. The Request briefly described the standard of review it would apply, in the following terms:

> Upon review, the Chamber must request the Prosecutor to reconsider her decision not to investigate if it concludes that the validity of the decision is *materially affected* by an error, whether it is an error of procedure, an error of law, or an error of fact.[69]

[68] *See e.g.* Report, paras. 41, 140; Prosecution Response to Comoros, para. 83; Prosecution Response to Victims, para. 66. *See also* Request, para. 35 (suggesting the Prosecution should have noted the allegation in a particular paragraph of the Report, notwithstanding its conclusion that there was no reasonable basis to believe the identified crimes were committed pursuant to a plan or policy). *See further* Prosecution Response to Victims, paras. 100, 104 (on relevance of the plan or policy analysis).
[69] Request, para. 12 (emphasis added).

38. As Judge Kovács noted, dissenting, this resembles the "standard of review applied by the Appeals Chamber in respect to interlocutory appeals and final appeals on the merit[s]."[70]

39. Yet unlike the practice of the Appeals Chamber, the Request did not proceed subsequently to define or to explain *the standard* by which the existence of any such errors would be determined.[71] Although it is generally accepted that legal determinations should be assessed on a 'correctness' standard, no explanation was made of the basis on which *factual* determinations would be assessed. In practice, despite the inclusion of some language which may imply the contrary, the Request seemed to adopt a *de novo* standard of review, requiring the Pre-Trial Chamber's subjective agreement with the Report.[72] Indeed, the Request seems to declare that no deference may be given to the Prosecution:

> [T]here is also no valid argument for the proposition that in order not to encroach on the independence of the Prosecutor, the Chamber should knowingly tolerate and not request reconsideration of decisions under article 53(1) of the Statute which are erroneous, but within some field of deference. The role of the Chamber in the present proceedings is to exercise independent judicial oversight.[73]

40. The Prosecution does not consider that the question is primarily one of prosecutorial independence, however, but the correct interpretation of the Statute and the necessary mechanics of judicial review. These issues, which are not addressed in the Request,[74] are considered in turn.

I. 2. a. Article 53(3)(a) contemplates an error-based review, not a de novo *decision*

41. Generally speaking, there are two principal approaches to judicial review.

[70] Dissenting Opinion, para. 6. *See also* para. 7 (doubting "the Pre-Trial Chamber is called upon to sit as a court of appeals with respect to the Prosecutor's decisions").
[71] *See* Dissenting Opinion, paras. 6-7 (doubting "the legal basis for the applicability of the standard of review introduced by the Majority […] without expla[nation]"), 9.
[72] *See furtber below* paras. 66-68.
[73] Request, para. 15.
[74] Request, para. 8-10, 14-15 (acknowledging aspects of the statutory framework, but in a different context).

- The first is *de novo* review, in which the reviewing body steps into the shoes of the original body, reassesses the *same information*, and considers whether it would take the same decision. A *de novo* review is satisfied only if the reviewer *agrees* with the decision under review.

- The second approach (an "error-based review") scrutinises the decision under review for error but, provided no error is found, does not enter into the merits of the matter under consideration nor reassess the available information. It does not require substantive agreement by the reviewer with the decision—rather, it asks whether no reasonable fact-finder could have reached that decision.

42. On factual matters, this second approach thus usually emphasises the *reasonableness*, or otherwise, of the original decision. Since the reviewing body applying this second approach will usually not itself have scrutinised the primary information underlying the decision, it will afford at least *some deference* to the appreciation of the original decision-making body on factual matters. The deference afforded may vary to a greater or lesser degree depending on the context.[75] Considerations relevant to determining how much deference is appropriate may include the subject-matter of the relevant law, its scheme and plain terms, the consequences of the decision under review, the expertise of the judges and the decision-maker, and the broader context.[76]

43. In ascertaining the proper standard of review for article 53(3)(a), consistent with article 21 of the Statute and article 31 of the Vienna Convention on the Law of Treaties, consideration should be given to the ordinary meaning of the terms of

[75] STL, *Ayyash* Jurisdiction Appeal Decision, Separate Opinion of Judge Baragwanath, para. 72 ("There are many forms of judicial review", ranging from "*de novo* consideration of decisions […] in which the judges have specialist expertise" all the way to "issues of high policy" where "the judges' own lack of relevant knowledge and expertise all require them to assume a minimal role").
[76] STL, *Ayyash* Jurisdiction Appeal Decision, Separate Opinion of Judge Baragwanath, para. 75.

article 53(3) of the Statute, in context, and in light of the Statute's object and purpose.[77]

44. The Statute and the Rules do not expressly state the nature or standard of review applicable under article 53(3)(a) of the Statute. The requirement for the Prosecution to be satisfied of a "reasonable basis to proceed" in article 53(1), however, may indicate that any standard of review in this respect must be based on an assessment of 'unreasonableness'.[78]

45. The context of article 53(3)(a)—and, in particular, its differences from articles 15(4) and 53(3)(b)—is particularly instructive.

46. Where the Prosecution has sought to initiate an investigation *proprio motu*, under article 15, the Pre-Trial Chamber clearly is required to implement a *de novo* review. This follows from the language of article 15(4) itself, which permits such an investigation only when *the Pre-Trial Chamber*, or its majority, likewise "consider[s] that there is a reasonable basis to proceed".[79] In other words, the Prosecution and the Pre-Trial Chamber must *agree*. That the Pre-Trial Chamber's assessment is based on its own independent view of the information considered by the Prosecution is, moreover, illustrated by article 15(3), which requires the Prosecution under all circumstances to provide the "supporting information" for the Pre-Trial Chamber's scrutiny.

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[77] *See above* para. 18.
[78] *See also* Knoops and Zwart, at 1079-1081 (concerning review, in their definition, of discretionary powers)
[79] *See* *Kenya* Article 15 Decision, para. 24; *Côte d'Ivoire* Article 15 Decision, paras. 18, 21-22, 189-191, 207-208; *Côte d'Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, paras. 14-15. This is unlike article 53(3). Article 15(4) thus contemplates stricter scrutiny than article 53(3), arising from the drafters' concern for a check on the Prosecutor's discretion when exercising her powers *proprio motu*: *see e.g.* Fernández de Gurmendi, pp. 183-187; Guariglia, pp. 227-231. *See also* Knoops and Zwart, at 1076 ("Article 53(3) […] is contrasted by Article 15 […], which embraces a stricter standard of review"). The Prosecution stresses that the standard of review applied by the Pre-Trial Chamber thus varies between articles 15(4) and 53(3) while the underlying standard of proof ("reasonable basis to proceed") remains the same: Bitti, pp. 1180-1181, 1186 ("*l'examen préliminaire de l'article 15 du Statut est exactement le même que celui de l'article 53 du Statut*").

47. Article 53(3)(a) is different. Where the Prosecution *declines* to initiate an investigation into a situation, the drafters of article 53(3)(a) expressly did *not* require that the Pre-Trial Chamber must itself agree with the Prosecution's decision. Instead, they used language more similar to appellate or judicial review. Article 53(3)(a) thus specifies only that the Pre-Trial Chamber "*may review*" the decision, when requested by the referring State or the UN Security Council (emphasis added). This understanding is supported by rule 107(2) which—unlike article 15(3)—makes clear that the Prosecution is not *obliged* to provide the Pre-Trial Chamber with the information supporting its article 53(1) determination for the purpose of an article 53(3)(a) review, unless requested.[80] Accordingly, the Rules plainly contemplate that the Pre-Trial Chamber may undertake an article 53(3)(a) review without scrutinising the information in the Prosecution's possession, which would be necessary for a *de novo* review. Indeed, rule 107(2) provides only that "[t]he Pre-Trial Chamber *may request* the Prosecutor to transmit the information or documents in his or her possession, *or summaries thereof*, that the Chamber considers necessary for the conduct of the *review*" (emphasis added).[81]

48. Further confirming that article 53(3)(a) does not require a *de novo* review, unlike article 15(4), are the different characteristics of reviews under articles 53(3)(a) and 53(3)(b). Although both provisions describe the Pre-Trial Chamber as "review[ing]" the Prosecution's determination, the disposition of those reviews is different. For article 53(3)(b), the Prosecution decision "shall be effective only if confirmed by the Pre-Trial Chamber", whereas for article 53(3)(a), the Pre-Trial Chamber may only "request" the Prosecution "to reconsider the decision". Two conclusions follow from this distinction.

[80] *See also* Regulations of the Court, reg. 48(1) (providing similarly that, when considering a review under article 53(3)(b)).
[81] *Compare* Statute, article 15(3) (the Prosecutor "*shall* submit to the Pre-Trial Chamber a request for authorization of an investigation, together with *any* supporting material", emphasis added).

- First, under article 53(3)(b), "confirmation" of the reviewed decision is in fact the same disposition which may be ordered by the Appeals Chamber when it decides—after an error-based review, not a *de novo* review—that no error has been established.[82] Given the interpretive value in understanding like terms in the Statute alike (to the extent possible), the reference to "confirmation" in article 53(3)(b) may thus still be potentially interpreted as an error-based review, like judgments of the Appeals Chamber, rather than a *de novo* review.[83]

- Second, even if article 53(3)(b) *were* to be interpreted as a *de novo* review like article 15(4), article 53(3)(a) neither contains the language of "confirmation" nor is subject to rule 110(2), and so must still logically be distinguished from article 53(3)(b).[84]

49. The object and purpose of article 53(3)(a) is further inconsistent with any interpretation requiring a *de novo* review by the Pre-Trial Chamber. In determining that object and purpose, the Prosecution is guided in particular by the unique nature of the Court's mandate (expressed, *inter alia*, in the Preamble and article 1), the principles of complementarity and prosecutorial independence (in articles 1, 17, and 42), and the intricate and balanced scheme by which situations may be brought before the Court (set out in articles 13-15, and 53). Within this scheme, the Statute emphasises whether the Prosecution is *itself* satisfied that the legal conditions in article 53(1)(a) and (b) are met, based upon its assessment of the available information. The Prosecution's assent—that the conditions under article 53(1)(a) and (b) are met—is indispensable for the initiation of any investigation, combined with any one of the following:

[82] Rule 158(1). *See also* rule 153.
[83] Regulation 48 may also be considered to support this interpretation.
[84] *Cf.* Bitti, p. 1185. Although the Prosecution agrees that decisions taken by the Pre-Trial Chamber under article 53(3)(b) are binding, the express contrast with non-binding decisions taken under article 53(3)(a) is significant, and cannot be overlooked.

- the assent of a State Party by making a referral under article 13(3)(a); or

- the assent of any other State by accepting the Court's jurisdiction under article 12(3); or

- the assent of the UN Security Council by referring a situation to the Court, pursuant to chapter VII of the UN Charter, under article 13(b); or

- the assent of the Pre-Trial Chamber under article 15.

50. Nothing in the Statute, or its drafting history, suggests that an investigation can be initiated *without* the assent of the Prosecution that the conditions in article 53(3)(a) and (b) are met. This is demonstrated, *inter alia*, by rule 108(2) and (3), which leave the Prosecution with the 'final say' in conducting its reconsideration once requested by the Pre-Trial Chamber.[85]

51. Within this scheme, an *error*-based review by the Pre-Trial Chamber makes sense: specifically, the Prosecution may generally be expected to depart from its original view when it is satisfied by the Pre-Trial Chamber's reasoning that it has erred in law or reached an unreasonable factual conclusion. Conversely, a *de novo* review—which identifies no error, but merely reaches an alternative conclusion—makes less sense. If the Prosecution were to change its original reasoned view simply because the Pre-Trial Chamber disagrees with its conclusion, this risks two significant adverse consequences. First, it gives the appearance that the Prosecution's statutory independence is compromised—it can simply be "told" that it has reached the wrong conclusion, even when no particular error has been identified. Second, it gives the appearance that the Prosecution's original decision-making was arbitrary—if the Prosecution is willing to alter its conclusions simply when asked, without a showing of error, this may imply that the Prosecution's reasoning was not dictated

[85] *See above* para. 3. *See also* Statute, art. 53(3)(b) (preserving the requirement for the Prosecution to have made a positive determination under article 53(1)(a) and (1)(b)).

by the law and the facts. Accordingly, since the Statute promotes the independence of the Prosecution, as well as due respect for the holders of high judicial office, an error-based review in article 53(3)(a) is more consistent with this object and purpose than a *de novo* review.

52. The Prosecution notes in this context that the Request seems to have directed itself in principle, although not in so many words, to adopt an error-based approach.[86] This is consistent with the principles just discussed. However, the majority's view was not unequivocal; in particular, it seemed to consider that a more intrusive review was required for decisions *not* to open an investigation.[87] Such an approach would seem to emphasise one view of the object and purpose of article 53 but, conversely, challenges the conventional interpretation of articles 15(4) and 53(3)(a), based on the ordinary meaning of their terms and their context.[88]

53. For the following reasons, the Prosecution cannot agree that article 53(1) reflects any presumption in favour of opening an investigation when factual questions decisive to the Prosecution's analysis under article 53(1)(a) and (b) remain unclear.[89]

54. First, the Prosecution understands the word "shall" in article 53(1) to mean that an investigation *must* be opened *if* the criteria in article 53(1)(a) to (c) are met[90]—in

[86] Request, para. 12 (stating that the Pre-Trial Chamber must intervene when "the validity of the decision is materially affected by an error, whether it is an error of procedure, an error of law, or an error of fact"). *But see also* para. 10 (noting that "the Chamber is not tasked with undertaking *ex novo* the entirety of the Prosecutor's assessment under article 53(1)(a)", but making this distinction based on the "scope of review"—meaning "the issues that are raised in the request for review"—and not the manner in which that review is conducted).
[87] *See e.g.* Request, paras. 9, 13 ("the presumption of article 53(1) […] is that the Prosecutor investigates in order to be able to properly assess the relevant facts"), 15 ("there is also no valid argument for the proposition that in order not to encroach on the independence of the Prosecutor, the Chamber should knowingly tolerate […] decisions under article 53(1) of the Statute which are erroneous, but within some field of deference. The role of the Chamber in the present proceedings is to exercise independent judicial oversight"). *Compare* *Georgia* Article 15 Decision, paras. 3 (the same majority reasoning, by contrast, that when the Prosecution seeks to *open* an investigation, "the Chamber's examination of the Request [under article 15(4)] and the supporting material provided by the Prosecutor must be strictly limited"), 35. *See further* Dissenting Opinion, paras. 6-8; *Georgia* Article 15 Decision, Separate Opinion of Judge Kovács, paras. 3-10, 12.
[88] *Cf.* *Katanga*, Dissenting Opinion of Judge Pikis, para. 11 ("[a] teleological or purposive interpretation" of a legislative provision "acknowledges no power and, far less, it allows no liberty to the Court to either refashion the terms of a legislative provision or add terms to its text that are not there").
[89] *See also above* para. 25; *below* para. 158.

other words, there is no residual discretion to find that the criteria are met, but not to investigate. This has been the Prosecution's consistent position.[91] The Prosecution does not consider that the word "shall" supports any broader presumption favouring investigation where there is *not* a reasonable basis to proceed in accord with articles 53(1)(a) to (c).[92]

55. Second, the Prosecution can find nothing in the Statute, or its drafting history, to support the notion of any broader presumption favouring the opening of investigations *at the international level*. To the contrary, articles 53(1)(a) and (b) have been consistently understood to require the Prosecution (and the Pre-Trial Chamber) to apply a neutral, law-driven, conditional analysis. This neither favours nor presumes any particular outcome, but instead guarantees that an investigation is opened when the available information shows it to be justified. Moreover, the drafters of the Statute expressly affirmed that *States* have "the primary responsibility […] to investigate and prosecute" crimes under the Statute.[93] Not only is the jurisdiction of the Court limited to the "most serious" offences of international concern,[94] but it must defer to genuine State proceedings,[95] *and* its own interventions, even then, must be justified by the gravity of the actual or potential case(s) identified.[96] A presumption in favour of investigation, in which these conditions were deemed to be met even *without* the requisite supporting information, would undercut these well established principles.

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[90] *See* Statute, art. 53(1) ("The Prosecutor *shall* […] initiate an investigation *unless* he or she determines that there is no reasonable basis to proceed", emphasis added).
[91] *See* Prosecution Response to Comoros, para. 27; Prosecution Response to Victims, paras. 20, 23. *See also above* paras. 16, 20.
[92] *Cf.* Request, para. 13.
[93] *See e.g.* ASP, *Strengthening the ICC*, para. 85; OTP, Policy Paper on Preliminary Examinations, para. 23. See also Statute, Preamble ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and "Emphasizing that the International Criminal Court […] shall be complementary to national criminal jurisdictions"), art. 1 (the Court "shall be complementary to national criminal jurisdictions"). Mindful of this principle, given effect in article 53, the Prosecutor will not seek to open an investigation without a reasonable basis to proceed under the Statute. *Contra* Longobardo, at 16 ("Initiating a proper investigation would have offered the OTP the chance to dispel those doubts, with no harm to anyone's rights").
[94] *See e.g.* Statute, arts. 1, 5.
[95] *See e.g.* Statute, arts. 1, 17(1)(a) and (b), 18(2)-(6), 19(11), 53(1)(b), 53(2)(b).
[96] *See e.g.* Statute, arts. 17(1)(d), 53(1)(b), 53(2)(b).

56. Absent any broad presumption in favour of opening investigations at the Court, the Prosecution can find no other argument to contradict its interpretation of the standard of review in article 53(3)(a), based on the VCLT and the established interpretive practice of this Court.

57. For all the preceding reasons, therefore, the Prosecution considers that article 53(3)(a) review should not be interpreted as requiring a *de novo* review, but rather as requiring an error-based review. This is significant because, to the extent the Request proceeds on the basis of a *de novo* review, the Prosecution will be less able to follow its reasoning in the exercise of its statutory discretion in reconsidering the Report.

I. 2. b. An error-based review requires some margin of deference to the primary fact-finder

58. Intrinsic to an error-based review, on factual matters, is the provision of some degree of deference to the primary finder of fact (*i.e.*, the Prosecution, for preliminary examinations). This is necessary because, unlike a *de novo* review, an error-based review focuses upon analysing the *reasoning* of the fact-finder—and in circumstances where the reviewing body (the Pre-Trial Chamber) will not usually have before it the actual information which the fact-finder examined, as in this case.[97]

59. The appellate practice of this Court reflects this approach. Thus, in *Ngudjolo*, the Appeals Chamber reaffirmed that in hearing an appeal against an article 74 judgment:

> [I]t will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the 'misappreciation of facts', the Appeals Chamber has also stated that it 'will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the

[97] *See below* para. 68.

> Chamber's conclusion could have reasonably been reached from the evidence before it'[.][98]

60. Such an approach is fundamental to any appellate or error-based review because it recognises that, even after as rigorous a proceeding as a criminal trial, "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence, *both of which are reasonable*."[99] This consideration applies even more strongly to determinations which have been made at a lower standard of proof than that applicable to a criminal trial, such as determinations under article 53 of the Statute.

61. Furthermore, that some deference must be owed by an error-reviewing body to the primary finder of fact does *not* necessarily mean recognising that the fact-finder had a discretion in the execution of their legal obligations. Accordingly, to say that article 53(1)(a) and (b) impose "exacting legal requirements" upon the Prosecution—rather than any "discretion", which the Request suggests is "expresse[d] […] only in [article 51(1)(c)]"—has no bearing on the requirement to give *some* deference in reviewing the Prosecution's evaluation of factual matters, at least in circumstances where the Pre-Trial Chamber has not reviewed the underlying information.[100] Likewise, the need for *some* deference on an error-based review of factual matters does not result from considerations relating to prosecutorial independence, nor is it affected by the importance of "independent judicial oversight".[101]

62. Instead, such questions of the nature and extent of any prosecutorial discretion,[102] prosecutorial independence and judicial oversight are more significant

[98] *Ngudjolo* AJ, para. 22 (quoting *Lubanga* AJ, para. 21).
[99] ICTR, *Ntawukulilyayo* AJ, para. 15 (emphasis added).
[100] *Cf.* Request, para. 14.
[101] *Cf.* Request, para. 15.
[102] *Compare e.g.* Request, para. 14, *with* Turone, p. 1152 (suggesting that article 53(1)(a) and (b) are at least "substantially non-discretionary" because they are based on the assessment of objective criteria—but then nevertheless noting some scope for discretion in the gravity analysis under article 53(1)(b)). *See also* DeGuzman and Schabas, p. 144.

in determining *how much* deference should be provided.[103] This is because even an error-based review may be more or less stringent depending on various factors, including the nature and procedural context of the decision subject to review.[104]

63. The Request appears not to have accepted the Parties' and participants' largely consistent submissions on the appropriateness of an error-based standard of review—irrespective whether that standard was best analogised to the standard for an appeal of a discretionary decision by a judge in adversarial proceedings,[105] or a judicial review of a decision taken by an executive body in non-adversarial proceedings.[106] Either of these standards (which are not so dissimilar[107]) would have afforded a reasonable margin of deference, yet still permitted the Pre-Trial Chamber to intervene if the Prosecution misinterpreted the law, breached a principle of natural justice, or was unfair; if it took irrelevant information into account in reaching its decision, or failed to take account of relevant information; or if it reached a factual conclusion which was so unreasonable that no reasonable person with the same information could have made it.[108]

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[103] *See also* Knoops and Zwart, at 1074 ("Given the importance of prosecutorial discretion, judicial supervision seems only warranted in exceptional circumstances"), 1076 ("Article 53(3) […] was not enacted to invade the prosecutor's independence"), 1078-1079 ("the role of the prosecutor *vis-à-vis* the [Pre-Trial] Chamber is different from the interrelationship between Trial and Appeals Chambers").
[104] *See above* para. 42.
[105] *See e.g.* Request for Review, para. 52 (quoting *Kony* Admissibility Appeal Decision, para. 81: "the question is not whether the Appeals Chamber agrees with the […] conclusion, but rather 'whether the Trial Chamber has correctly exercised its discretion […]'"); Victims' Observations (Independent Counsel), paras. 14, 71 (factual conclusions which were "so unreasonable" or "palpably unreasonable" should be reversed).
[106] *See e.g.* Prosecution Response to Comoros, para. 14 ("the Pre-Trial Chamber should take into account the primary role of the Prosecution in the preliminary examination procedure, which is distinct from that of a Chamber in judicial proceedings. For the purpose of article 53(3), the Pre-Trial Chamber is not in the position of a higher court reviewing the decision of a lower court, even upon a matter of discretion, but is more akin to a court reviewing a decision by a governmental body"); Victims' Observations (OPCV), para. 24 (suggesting review based on 'reasonableness' based apparently on the standard for judicial review of a governmental decision in England and Wales: *see further* Prosecution Response to Victims, para. 17, fn. 18).
[107] *See also* Prosecution Response to Comoros, para. 14, fn. 32 ("[a]lthough the terminology commonly used" in determining whether there has been an abuse of discretion—the standard urged by the Comoros—"may be similar" to the 'judicial review' standard, "the necessary deference may be greater").
[108] *See e.g. Bahati* Judicial Review Decision, para. 16; *Bemba* Judicial Review Decision, para. 12. For the similar practice of other jurisdictions, *see e.g.* ICTY, *Karadžić* Indigence Appeal Decision, paras. 4-5; *Karadžić* Facilities Appeal Decision, para. 10; England and Wales, *Wednesbury*, at 229, *per* Lord Greene, M.R.; *Council of Civil Service Unions*, at 410, *per* Lord Diplock; Canada, *Dunsmuir*, paras. 46-51, 53, 55-56, *per* Bastarache and Lebel, JJ., for the majority; USA, *Chevron*, at 843-844, *per* Stevens, J., for the Court. Furthermore, national

64. Indeed, Judge Kovács stressed in his dissenting opinion that "the main idea underlying article 53" is "a balance between the Prosecutor's discretion/independence and the Pre-Trial Chamber's supervisory role in the sense of being limited to only requesting the Prosecutor to reconsider her decision if necessary."[109] As a result, "the Pre-Trial Chamber's role is merely to make sure that the Prosecutor has not abused her discretion", calling "for a more deferential approach" and acknowledging that the Prosecution has "some margin of discretion" under article 53.[110] The Prosecution agrees with this position.

65. What is most significant, however, is that all these approaches recognise that *some* degree of deference on factual matters was required, consistent with the principles previously set out. Accordingly, in carrying out an error-based review under article 53(3)(a), the Pre-Trial Chamber should have acted accordingly, whatever particular approach it chose to adopt, and afforded *some* deference on factual matters. To the extent the Request provides no deference at all, the Prosecution will be less able to follow its reasoning in the exercise of its statutory discretion in reconsidering the Report.

I. 2. c. Disagreement concerning the correct interpretation of article 53(3)(a) prevents the Prosecution from concurring with the Request

66. Given its disagreement with the majority of Pre-Trial Chamber I's interpretation *in practice* of article 53(3)(a), which directly affects the correctness of the standard of review applied in the Report, the Prosecution cannot concur in the basic premise of the Request. In particular, rather than applying an error-based standard of review, providing *some* deference to the Prosecution on factual matters and thus only criticising factual conclusions which were objectively *unreasonable*, the majority seemed to conduct a *de novo* review and to request the Prosecution to reconsider the

jurisdictions, such as England and Wales, apply just such a standard in the judicial review of prosecutorial decisions: *see e.g.* England and Wales, CPS Judicial Review Guidance.
[109] Dissenting Opinion, para. 8.
[110] Dissenting Opinion, para. 8.

Report based on its own disagreement with its conclusions. Had it correctly interpreted the standard of review under article 53(3)(a), the Prosecution considers that the Pre-Trial Chamber would not have issued the Request.

67. The majority's disagreement with the Report seems apparent, for example, in its contrasting view of the conclusion(s) which should be drawn from: reports of live fire prior to the boarding of the *Mavi Marmara*;[111] allegations of excessive force by IDF troops (the *actus reus* of the identified crimes);[112] allegations of damage to some CCTV cameras aboard the *Mavi Marmara*;[113] and the unique occurrence of the identified crimes aboard the *Mavi Marmara*.[114] On just two occasions did the majority characterise a factual conclusion in the Report as "unreasonable"—and thus purport to substantiate an error—but on those occasions its underlying analysis was still not apparently conducted on this basis.[115]

68. Furthermore, the Prosecution recalls that the Pre-Trial Chamber did not request access to the information underlying the Report, pursuant to rule 107(2). Disagreements concerning the evaluation of the available information can only be given very limited weight by the Prosecution when the reviewing body has not had opportunity to examine the available information itself.

[111] Request, para. 36. The majority also appears to have misapprehended the Prosecution's reasoning: *see above* para. 34; *below* para. 94.
[112] Request, para. 41. *See further* Prosecution Response to Victims, para. 113.
[113] Request, para. 41. *See further* Prosecution Response to Comoros, para. 85.
[114] Request, para. 43. The majority also failed to acknowledge significant relevant facts in this respect: *see below* paras. 89-91.
[115] On the first occasion, the majority stated that it was unreasonable not to conclude from the allegedly systematic mistreatment on Israeli territory, "a certain degree of sanctioning of the unlawful conduct on the *Mavi Marmara*": Request, paras. 38, 44. Yet the Prosecution did not find a reasonable basis to believe the alleged mistreatment on Israeli territory was "systematic": *see below* para. 94. On the second occasion, the majority framed its conclusion in terms of unreasonableness, but its preceding analysis again reveals a disagreement with the Prosecution's conclusion but no examination of what was, in objective terms, reasonable: *compare* Request, para. 44 (conclusion), *with* paras. 39-43 (reasoning). *See also below* paras. 127-134, 148-165 (concerning the treatment of detainees on the *Mavi Marmara*, destruction of CCTV cameras, and the distinction between the *Mavi Marmara* and other vessels).

I. 3. The Prosecution disagrees with the reasoning in the Request

69. Finally, the Prosecution disagrees with the manner of reasoning in the Request. In other circumstances, an absence of sufficient reasoning—specifically, reasoning which indicates with sufficient clarity the basis of the Request, and its predicate legal and factual conclusions—may well be legally erroneous.[116] Moreover, of even greater importance in the context of article 53(3)(a), an absence of sufficient reasoning poses a substantial impediment to the Prosecution understanding, and being convinced by, the Pre-Trial Chamber's concerns when carrying out its reconsideration.

70. In this context, sufficient reasoning does not mean only that the Pre-Trial Chamber provides some justification for its view. For obvious practical reasons, it will also often entail a further obligation to explain why certain factors entertained by the Prosecution are considered *not* to be relevant,[117] or why certain legal or factual arguments are flawed or unconvincing.[118] Simply put, to assist the Prosecution in reconsidering its original article 53(1) determination, the Pre-Trial Chamber needs to explain why the Prosecution was incorrect in law or unreasonable in its factual conclusions. This means a substantive engagement with the Prosecution's position, as it actually was.

71. The Request appears to have fallen short of these principles in three respects.

- First, the Request provides insufficient or unclear reasoning for its conclusions.

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[116] *See e.g.* *Lubanga* Redactions Appeal Decision, para. 20.
[117] *See e.g.* *Lubanga* Redactions Appeal Decision, para. 21 (taking into account the Pre-Trial Chamber's failure "to address properly three of the most important considerations"). *See also* *CAR Art. 70* Interim Release Appeal Decision, paras. 54-55 (finding error in applying a statutory provision where the chamber failed to address or sufficiently to explain relevant issues); ICTY, *Stanišić and Simatović* AJ, paras. 87-90; *Perišić* AJ, para. 92; *Gotovina* AJ, paras. 25, 61, 64; ICTR, *Zigiranyirazo* AJ, paras. 44-46; *Muvunyi* AJ, paras. 144-148; *Simba* AJ, paras. 142-143.
[118] *See e.g.* ICTY, *Tolimir* AJ, para. 9; *Popović* AJ, para. 17; *Đorđević* AJ, para. 14; *Perišić* AJ, para. 9; *Lukić* AJ, para. 11; *Gotovina* AJ, para. 12. Although ordinarily a chamber has a somewhat broad discretion "as to which legal arguments to address", in "certain cases" the "requirements" may be "higher": *Kvočka* AJ, paras. 23-24. *See also* ICTR, *Karera* AJ, paras. 20-21.

- Second, the Request appears to have mistaken or mischaracterised the Prosecution's position on a number of issues. It thus rejected arguments which had not been made while failing to address arguments which had been made.

- Third, by failing to address salient aspects of the analysis in the Report (as explained by the Prosecution in its submissions to the Pre-Trial Chamber), the Request impedes the Prosecution's ability to understand why its reasoning may have been erroneous, as opposed to merely supporting a conclusion different from that desired by the majority. Even if *arguendo* the Prosecution assumes that the majority's silence on these aspects amounts to a determination of an error, the Request gives no explanation for any such determination which would allow the Prosecution meaningfully to (re)consider such views on their merits.

72. In particular, the Request fails to provide sufficient reasoning with respect to at least five legal or factual issues in the Report.[119] These are addressed in turn. In each case, the relevant argument or issue was either omitted from the Request altogether, or was misunderstood or mischaracterised. This materially affects the analysis in the Request, in which the disposition (requesting the Prosecution to reconsider the Report) was expressly based on "the combination of" five factors.[120]

[119] In general, the Prosecution notes that the Request cites the Prosecution's submissions approximately seven times: *see* Request, paras. 16, 23, 33-35, 37-38, 40. However, in the Prosecution's view, five of these references are made in the context of an apparent misunderstanding or mischaracterisation of the Prosecution's position: *see e.g.* Request, paras. 23, 33-35, 37-38. Moreover, for most of the factors central to the analysis in the Request, the Prosecution's submissions were not expressly referred to at all: *see e.g.* Request, paras. 25-26 (referring to the Report and the Comoros' submissions only in considering the second factor: scale of crimes), 27-30 (referring to the Report and the Comoros' submissions only in considering the third factor: nature of the crimes), 42-43 (referring to the Report and the Comoros' submissions only in considering part of the fourth factor: manner of commission of crimes, concerning the unique events aboard the *Mavi Marmara*), 46-48 (referring to the Report and the Comoros' submissions only in considering the fifth factor: impact on victims).

[120] Request, para. 49. These comprise: the possible objects of any investigation (first factor); the scale of the identified crimes (second factor); the nature of the identified crimes (third factor); the manner of commission of the identified crimes (fourth factor); the impact of the identified crimes (fifth factor).

I. 3. a. Qualitative, as well as quantitative, factors must be taken into account in determining gravity

73. The Request does not sufficiently address the interplay between qualitative and quantitative factors in the gravity determination, raised not only in the Prosecution's submissions but also in the original Report.[121] This materially affected the analysis concerning the second and fifth factors analysed in the Request (scale of identified crimes; impact of identified crimes on direct and indirect victims).

74. Discussing the second factor (scale of the identified crimes), the Request states only:

> [T]he Prosecutor and the Comoros essentially agree on the numbers of victims of the identified crimes. In the view of the Chamber […] the scale of the crimes […] arising from the referred situation, in addition to exceeding the number of casualties in actual cases that were previously not only investigated but even prosecuted […] (*e.g.* the cases against Bahar Abu Idriss Abu Garda and Abdallah Banda), are a compelling indicator of sufficient, and not of insufficient[,] gravity. The factor of scale should have been taken into account by the Prosecutor as militating in favour of sufficient gravity, rather than the opposite […].[122]

75. Discussing the fifth factor (impact of the identified crimes on direct and indirect victims), the Request concluded that the Report was "flawed" in failing:

> to consider that, before attempting a determination of the impact of the identified crimes on the lives of the people in Gaza, the significant impact of such crimes on the lives of the victims and their families, which she duly recognised, is, as such, an indicator of sufficient gravity.[123]

76. These findings broadly accept that the Prosecution in the Report accurately quantified the number of victims of the identified crimes aboard the *Mavi Marmara*,

[121] *See* Report, paras. 143-145. *See also* Prosecution Response to Comoros, paras. 68-73; Prosecution Response to Victims, paras. 110, 116.
[122] Request, para. 26.
[123] Request, para. 47 (continuing: "[w]hile considerations with respect to the impact of the crimes beyond the suffering of the victims could be relevant […] it is not required that any such impact, let alone one equally 'significant', be discernible such that its absence could be taken into account as outweighing the significant impact of the crimes on the victims").

and duly recognised the impact of the identified crimes upon those victims and their families.[124]

77. However, the Request does not address the basis on which the Prosecution considered that "the total number of victims of the flotilla incident reached relatively limited proportions as compared, generally, to other cases investigated by the Office"[125]—in particular, the circumstances of the *Abu Garda* and *Banda* cases (which are, in relevant part, identical). Although the majority likewise referred to these cases,[126] it did not consider those particular characteristics.

78. As the Report expressly states, *Abu Garda* likewise concerned the allegation of "a single attack involving a relatively low number of victims"—but it was "distinguishable" because of "the nature and impact of the alleged crimes", which were committed against international peacekeeping forces.[127] Accordingly, the attack alleged in *Abu Garda* differed *in nature* from the identified crimes aboard the *Mavi Marmara*. Crimes against international peacekeepers strike at the heart of the international community's mechanisms for collective security,[128] and thus their direct and indirect victims include not only the peacekeepers and their families, but also the large number of civilians deprived of protection more widely because of the disruption to the peacekeepers' operations.[129] The Request does not address this distinction.[130]

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[124] Concerning the difficulty of estimating the specific number of persons who may have been victims of outrages upon personal dignity, *see below* paras. 127-129.
[125] Report, para. 138.
[126] Request, para. 26.
[127] Report, para. 145. *See also* Prosecution Response to Comoros, paras. 68, 71-72; Prosecution Response to Victims, para. 116.
[128] Report, para. 145 (quoting the ILC's draft code of crimes).
[129] Report, para. 145 (citing *Abu Garda* Confirmation Decision, paras. 33-34).
[130] Likewise, the recent *Al Mahdi* case—solely concerning attacks on property protected under article 8(2)(e)(iv) of the Statute—was considered sufficiently grave to be admissible before the Court, resulting in a conviction. In the context of sentencing, the Trial Chamber stressed that the charged conduct was of "significant gravity", among other reasons, because 1) the destroyed mausoleums were "among the most cherished buildings" in Timbuktu, an "emblematic city" which "played a crucial role in the expansion of Islam in the region" and which is "at the heart of Mali's cultural heritage"; 2) the destroyed mausoleums were of proven significance to the inhabitants of Timbuktu not only as a matter of religious observance but also as a symbol and focus of

79. By not acknowledging the distinct *qualitative* factors in *Abu Garda*,[131] or the express reasoning of the Report, the Request thus took an overly narrow view of the effect of the crimes in that case,[132] in comparison to any potential case(s) arising from this situation. In particular, the Prosecution had analysed whether the passengers aboard the flotilla, including the *Mavi Marmara*, were humanitarian workers (analogous to peacekeepers) precisely in order to determine a.) whether this constituted an additional (qualitative) factor militating in favour of sufficient gravity, as in *Abu Garda*; and b.) whether this indicated in any event a broader class of victims (beyond the persons aboard the *Mavi Marmara*, and associated indirect victims) as an additional (quantitative) factor militating in favour of sufficient gravity.[133] The Prosecution reasonably concluded that these factors were absent. The Request identifies no error in this conclusion.

80. Since the Request does not address the key qualitative factors which established the gravity of the *Abu Garda* and *Banda* cases, and apparently misunderstood or overlooked this reasoning in the Report, its conclusions regarding both the second factor (scale of the identified crimes) and fifth factor (impact upon victims of the identified crimes) were materially affected. Indeed, the majority appears simply to disagree with the Prosecution's view of the weight to be given to these factors, and the significance of any 'message' sent by the interception of the flotilla itself.[134] Given the Prosecution's understanding of the proper standard of review under article 53(3)(a), and the absence of a reasoned conclusion that the Report was in these respects incorrect or unreasonable, the Prosecution does not consider it appropriate to depart from its original determination in the Report.

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community activity and unity; and 3) all the destroyed sites but one were designated UNESCO World Heritage sites, whose destruction also directly affects "people throughout Mali and the international community": *Al Mahdi* TJ, paras. 76-82. This same reasoning is applicable, *mutatis mutandis*, to the question of admissibility.

[131] *See also* Bitti, pp. 1194-1195.

[132] *See e.g. Abu Garda* Confirmation Decision, para. 33 ("the alleged initial suspension and ultimate reduction of AMIS activities in the area as a result of the attack had a grave impact on the local population").

[133] Report, paras. 112-125, 146. *See also* Prosecution Response to Comoros, para. 72; Prosecution Response to Victims, para. 116.

[134] *See* Request, paras. 47-48. *See also below* paras. 132-133.

I. 3. b. Proper identification of the facts underlying the identified crimes, notwithstanding their legal characterisation, precluded any error in assessing their nature

81. The Request does not sufficiently address the Prosecution's proper identification of the criminal conduct, as a matter of *fact*, which may have been committed by IDF troops against detained persons aboard the *Mavi Marmara*.[135] As such, even if *arguendo* the Prosecution had erred in the Report in its legal characterisation of the relevant conduct, this showed no error in its assessment of the "nature" of the crimes for the purpose of its gravity assessment. The silence of the Request concerning this distinction materially affected its analysis of the nature of the crimes committed (its third factor).

82. The Request reasoned that:

> [T]he concept of nature of the crimes […] revolves around the relative gravity of the possible legal qualifications of the apparent facts […] [T]here is merit in the Comoros' statement that the exclusion, through an assessment of the severity of the pain and suffering inflicted by the conduct in question, of the possibility of the war crime of torture or inhuman treatment […] was 'surprisingly premature'. The proper differentiation between this crime and the war crime of outrages upon personal dignity […] (which according to the Prosecutor is sufficiently demonstrated) […] cannot credibly be attempted on the basis of the limited information available […] At this stage, the correct conclusion would have been to recognise that there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment were committed, and to take this into account for the assessment of the nature of the crimes as part of the gravity test.[136]

83. In this fashion, the majority apparently considered that the *same conduct* should have been regarded as intrinsically more grave in nature because it could not be ruled out that *future information* (*i.e.*, information not yet available to the Prosecution) *might* show that the elements of torture or inhuman treatment,[137] instead of outrages

[135] Request, para. 29. *See also* Report, para. 64; Prosecution Response to Comoros, paras. 75-77; Prosecution Response to Victims, para. 75.
[136] Request, paras. 28, 30.
[137] *See* Statute, art. 8(2)(a)(ii).

upon personal dignity,[138] are met. This is speculative.[139] Yet, even assuming *arguendo* that the Report incorrectly applied the severity requirement,[140] the Request still does not address:

- the "neutral significance" given in the gravity analysis of the Report to the *legal* characterisation of the identified mistreatment of detainees aboard the *Mavi Marmara*;[141]

- the Prosecution's express argument that the legal label assigned to a possible crime at the preliminary examination stage is irrelevant to its gravity, given the absence of any established hierarchy of offences under the Statute;[142] and, correspondingly,

- the Prosecution's express argument that it was the *factual* nature of the identified conduct—which was ultimately undisputed in the Request—which was relevant to the gravity analysis in the Report.[143]

84. In this context, the Prosecution considers that the majority's view of the difficulty in credibly distinguishing between legal characterisations at the preliminary examination stage only supports the Prosecution's view that the *factual*,

[138] *See* Statute, art. 8(2)(b)(xii).
[139] For similar reasoning in another context, *see also below* para. 158. The Prosecution further doubts that this approach is legally correct. First, to the extent the Request implies that analysis of some elements of some crimes under the Statute cannot "credibly be attempted" at the preliminary examination stage, this would lead to the view that article 53(1) cannot be applied equally to all crimes under the Statute. This is contrary to the plain meaning, and the object and purpose, of article 53(1). Second, to the extent the Request implies that the Prosecution may find a reasonable basis to believe a crime with more specific elements (such as torture) has been committed on the basis *solely* of information supporting a 'lesser included crime' (such as outrages upon personal dignity), this is inconsistent with the information-based approach of article 53(1).
[140] Request, para. 30. *But see* Report, para. 69; Prosecution Response to Comoros, paras. 100-103; Prosecution Response to Victims, paras. 76, 112.
[141] *See* Report, paras. 142, 144; Prosecution Response to Victims, para. 111. The Request does not directly address this submission. Yet, even if its reasoning were to be understood as suggesting the Report erred in this respect, this logic is suspect given the majority's own view on the difficulty of legal analysis at the preliminary examination stage: *see below* para. 84.
[142] *See* Prosecution Response to Comoros, para. 104; Prosecution Response to Victims, paras. 69, 74.
[143] *See* Prosecution Response to Comoros, para. 104.

rather than legal, characteristics of the identified conduct should be of primary relevance for its gravity analysis.

85. The Request does not explain the basis for its view that the "nature" factor in regulation 29(2) of the Regulations of the Office of the Prosecutor concerns "the relative gravity of the possible *legal* qualifications of the apparent facts, *i.e.* the crimes that are being or could be prosecuted."[144] Indeed, although chambers of this Court have agreed that "nature" is one potentially relevant criterion for assessing gravity, they did so at the initial urging of the Prosecution based on its own practice; the meaning of the term has never been judicially defined on an independent basis.[145]

86. In its *Policy Paper on Preliminary Examinations*, the Prosecution previously stated that the "nature" criterion refers to "the specific elements of each offence",[146] and cited as (non-exhaustive) examples forms of conduct which, no matter their legal characterisation for the purpose of charging, may be seen as especially grave by their factual nature.[147] The Prosecution acknowledges that the reference to "specific elements" in this context may be unclear. It thus emphasises its view that the "nature" factor encompasses the factual characteristics of the criminal conduct, and is *not* limited to the elements which must legally be proved to establish liability.[148] This is consistent with the general approach of the Statute, which distinguishes between jurisdiction *ratione materiae* ("the most serious crimes of concern to the international community as a whole")[149] and the gravity of actual or potential

[144] Request, para. 28.
[145] *See e.g.* *Abu Garda* Confirmation Decision, para. 31 ("the Chamber agrees with the Prosecution's view that, in assessing the gravity of a case, 'the issues of the nature, manner and impact of the [alleged] attack are critical'"); *Kenya* Article 15 Decision, para. 188; *Côte d'Ivoire* Article 15 Decision, paras. 203-204.
[146] Policy Paper on Preliminary Examinations, para. 63.
[147] Policy Paper on Preliminary Examinations, para. 63 ("such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction").
[148] *A contrario*, if the "nature" factor turned on the legal elements of the crime, this would necessarily imply a *de facto* hierarchy of crimes under the Statute, since it would imply that certain crimes whose legal elements are more demanding may be intrinsically more grave, and thus more worthy of investigation and prosecution. Nothing in the Statute supports such a view, nor is it justified in principle.
[149] Statute, art. 5.

"cases"[150]—it is implicit in this scheme that the gravity analysis as a whole is fact-driven, and not law-driven. This understanding is further reflected in the Prosecution's recent *Policy Paper on Case Selection and Prioritisation*, which refers to the "specific *factual* elements" of the alleged crimes as the basis for assessing their "nature" for the purpose of gravity.[151]

87. For these reasons, the Prosecution disagrees with the Request's analysis of the third factor (nature of the identified crimes), emphasising the legal characterisation,[152] and its apparent failure to take into account that, in any event, the facts—which were essentially undisputed—remained the same. For this reason, the Prosecution does not consider it appropriate to depart from its original determination in the Report in this respect.

I. 3. c. The violent resistance aboard the Mavi Marmara *was relevant to the manner of commission of the identified crimes*

88. The Request did not adequately address the factual context of violent resistance encountered by IDF troops aboard the *Mavi Marmara*. This materially affected its analysis of the fourth factor (manner of commission of the identified crimes), at least in part.

89. In analysing the fourth factor (manner of commission of the identified crimes), the Request noted that: "the events aboard the *Mavi Marmara* were indeed unique"—but disagreed with the Prosecution's view in the Report that "this is a factor militating against the conclusion that the identified crimes occurred pursuant to a plan."[153] Emphasising that "[o]nly an investigation would provide the necessary

[150] Statute, art. 17.
[151] OTP, Policy Paper on Case Selection and Prioritisation, September 2016, para. 39.
[152] *See also* Longobardo, at 10. The Report must be read as a whole. *See also below* paras. 160-165 (concerning the analysis of the nature of the crimes).
[153] Request, para. 43 (continuing: "[w]ithout an investigation, it is impossible to conclude, as the Prosecutor does, that the absence of crimes aboard the other vessels comparable to those aboard the *Mavi Marmara* is a factor that would negate, or militate against, the possibility that the identified crimes resulted from a deliberate plan, as this is not the only reasonable inference that could be drawn from this fact").

information to determine whether any other reasonable explanation exists",[154] the Request identified what it considered to be another reasonable view which "possibly explain[ed] that the *Mavi Marmara* was treated by the IDF differently from the other vessels of the flotilla from the outset."[155]

90. This reasoning does not consider the Report as a whole, and especially the context of violent resistance aboard the *Mavi Marmara*.[156] The Prosecution did not conclude that there was no reasonable basis to believe the identified crimes were committed according to a plan or a policy because of the fact, in isolation, that crimes occurred only aboard the *Mavi Marmara*.[157] Rather, the Prosecution reached that conclusion, reasonably, on the basis of the undisputed fact that the passengers aboard the *Mavi Marmara*, uniquely, resisted the IDF boarding operation, which led to a period of violent confrontation and chaos lasting up to 47 minutes.[158] The Prosecution further noted, for example, information suggesting that the IDF troops were surprised by, and unprepared for, the passengers' response.[159] These considerations weighed significantly in considering the reasonableness of any possibility, on the information available, that the identified crimes were committed according to a plan or policy.

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[154] Request, para. 43. The Prosecution disagrees with this reasoning. If there is no reasonable basis to proceed under article 53(1), the possibility that this would be disproved by an investigation does not justify an investigation. *See above* paras. 52-55.

[155] Request, para. 43 (the majority suggested that the distinction might be based on the people and goods aboard the *Mavi Marmara*—"approximately 80% of the people of the entire flotilla, including 'activists' allegedly linked to the Hamas" and the absence of "humanitarian supplies").

[156] The only reference in the Request to any resistance at all is the acknowledgement that the *Mavi Marmara* and the *Eleftheri Mesogios/Sofia* "clearly and intentionally refused to stop": Request, para. 43. However, this refusal occurred in the context of the IDF's prior warnings to the flotilla, rather than the boarding operation as such: *see* Report, paras. 94, 105, 119.

[157] The Report, at paragraph 140, merely states that "the commission of serious crimes was confined to one vessel, out of seven, of the flotilla." However, the Report must be read as a whole (especially, in this respect, with paragraphs 40-42, 45, 51), consistent with the general practice of this Court. The majority's approach, criticising paragraphs in isolation, is too narrow: *see* Request, para. 35.

[158] *See e.g.* Report, paras. 40-42, 45, 51 (IDF troops were resisted by a large group of passengers who attacked with, *inter alia*, fists, wooden clubs, iron rods, chains, slingshots (with metal and glass balls), and knives). *See also* paras. 78-82 (although vessels of the flotilla were also boarded by the IDF by force, the level of force was "significantly lower than that used on the *Mavi Marmara*"; "[p]assengers on these vessels offered limited or no violent resistance" and sustained "no significant serious injury or loss of life"). *See also* Prosecution Response to Comoros, paras. 50, 78, 85; Prosecution Response to Victims, paras. 63, 73, 143, 146.

[159] *See e.g.* Report, paras. 106-107, 109. *See also* Prosecution Response to Comoros, para. 49; Prosecution Response to Victims, paras. 72, 139.

91. Thus, even if the alternate possibility suggested by the majority of the Pre-Trial Chamber may *arguendo* be conceivable in isolation,[160] the Request did not consider whether it was reasonable in the context of the fact of the resistance aboard the *Mavi Marmara*. Yet this was the very basis of the determination in the Report. The Request did not evaluate whether the Prosecution's view in this respect was so unreasonable that no reasonable person could have made it.

92. The limited reference in the Request to the context of violent resistance aboard the *Mavi Marmara* is, moreover, surprising in light of the majority's further observation that the force used by the IDF was "totally unnecessary and incredible".[161] For the majority to have contemplated what might have constituted necessary or reasonable force, it should have considered the prevailing circumstances as they appeared at the time.[162] The Request provides no explanation or analysis in this respect.

93. In this context, the Prosecution stresses that the violent resistance aboard the *Mavi Marmara* did not prevent it from concluding that there was a reasonable basis to believe the identified crimes (especially wilful killing) were committed by some IDF soldiers[163]—even though, as the Prosecution previously recalled, this possibility is identified at the preliminary examination stage without considering questions of *individual* responsibility for individual fatalities, including self-defence.[164] While acknowledging the context of resistance does not mean condoning or negating the identified crimes at this stage, it is nonetheless highly relevant to assessing whether

[160] *See above* fn. 155.
[161] Request, para. 43 (citing Report, paras. 78, 108). Paragraph 78 of the Report states only, in relevant part, that the level of force used on other vessels in the flotilla was less than aboard the *Mavi Marmara*. Although paragraph 108 of the Report does contain this phrase, it is a quotation from the UNHRC Report, and is not a characterisation by the Prosecution. For more information on the four fact-finding reports considered in the Report, *see* Prosecution Response to Victims, paras. 50-55.
[162] The Prosecution makes this observation without prejudice to any possibility that, *in hindsight*, the degree of force used aboard the *Mavi Marmara* might have exceeded the minimum force reasonably required in the circumstances. Notwithstanding the grave concern that accompanies such a view, this state of affairs is not itself prohibited under the Statute.
[163] *See e.g.* Report, paras. 61, 72, 77.
[164] *See* Report, para. 57. *See also* Dissenting Opinion, paras. 31-42. Concerning individual fatalities, *see* Confidential Annex D.

there is a reasonable basis to believe those identified crimes occurred at the will of individual perpetrators, or as part of a deliberate plan or policy. The failure of the Request to address this fact, in its assessment of the fourth factor or at all, significantly undermines its factual conclusions. For this reason, the Prosecution does not consider it appropriate to depart from its original determination in the Report in these respects.

I. 3. d. The Prosecution cannot concur in other aspects of the reasoning in the Request

94. In addition to the preceding examples, addressed in detail, the Request appears to contain insufficient reasoning or misunderstandings material to at least three other relevant facts or arguments.

- In analysing the first factor (possible objects of any investigation), the Request emphasised the Prosecution's remark that there is not "a reasonable basis to believe that 'senior IDF commanders and Israeli leaders' were responsible as perpetrators or planners" of the identified crimes.[165] However, this remark was made only in response to the Comoros' argument, in the course of litigation, that there *was* a reasonable basis for such a conclusion.[166] The Prosecution had otherwise recognised that the factors taken into account in the Report suggested that 'the potential perpetrators of the identified crimes were among those who carried out the boarding of the *Mavi Marmara*".[167] In this context, it was implicit that such perpetrators *would be* the object of any investigation. This misapprehension significantly undermines the Request's conclusion on the first factor since, properly understood, the Prosecution did not "fail[] to consider whether persons likely to be the object of the investigation […] would include those who bear the greatest responsibility for

[165] Request, para. 23.
[166] *See* Request for Review, paras. 86, 88; Prosecution Response to Comoros, para. 62.
[167] Prosecution Response to Comoros, para. 60.

the identified crimes."[168] For this reason, the Prosecution does not consider it appropriate to depart from its original determination in the Report in this respect.

- In analysing the fourth factor (manner of commission of the identified crimes), the Request states that the Prosecution had "set aside the issue of live fire prior to the boarding".[169] But, as explained above, this was not the Prosecution's approach.[170] Together with the other errors identified, this misapprehension significantly undermined the Request's conclusion on the fourth factor. For this reason, the Prosecution does not consider it appropriate to depart from its original determination in the Report in this respect.

- Also in its analysis of the fourth factor (manner of commission of the identified crimes), the Request states that the Prosecution had "recognise[d]" the "systematic abuse of detained passengers from the *Mavi Marmara*" once transferred to Israeli territory.[171] Yet the Prosecution made no such statement, either in the Report or in its subsequent submissions to the Pre-Trial Chamber.[172] Rather, it stated that the facts showed *no reasonable basis* for such an inference, in the context of the identified crimes. Together with the other

[168] Request, para. 23.
[169] Request, para. 35.
[170] *See above* para. 34; *below* paras. 107-123.
[171] Request, para. 38 (referring to "the systematic abuse of detained passengers from the *Mavi Marmara*" which it states the Prosecutor "recognises, but merely finds 'concerning'"). *See below* paras. 135-147.
[172] *See e.g.* Prosecution Response to Comoros, para. 88 ("information suggesting further mistreatment of some detainees once they arrived on Israeli territory is concerning, even though the Court does not have jurisdiction over that conduct. However, nothing in this information now suggests that the Prosecution was unreasonable to find that there was no reasonable basis to infer that *the Identified Crimes […] were committed systematically or on a planned basis*. Indeed, the information highlighted by the Comoros appears to concern a variety of Israeli personnel in a variety of locations and does not seem to relate especially to the IDF troops who boarded the Three Vessels, or persons in those troops' chain of command", emphasis added); Prosecution Response to Victims, para. 81 ("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*", emphasis added), 103. Despite the apparent misstatement in paragraph 38 of the Request, the Prosecution notes that its position is reflected to some extent in the preceding paragraph: *see* Request, para. 37 (citing Prosecution Response to Comoros, para. 88). Although the Request criticised the language used in the Report regarding extrajurisdictional conduct, it did not find error in the Prosecution's position as subsequently explained: Request, paras. 17-19; Prosecution Response to Comoros, paras. 53-58.

errors identified, this mistake significantly undermined the Request's conclusion on the fourth factor. For this reason, the Prosecution does not consider it appropriate to depart from its original determination in the Report in this respect.

II. On the basis of the information available at the time of publication of the Report, there is no reasonable basis under the Statute to proceed with an investigation

95. The preceding paragraphs have set out in detail why the Prosecution disagrees with, and cannot follow, the reasoning of the Request in conducting its reconsideration. On this basis alone, this reconsideration could be terminated.

96. However, mindful of the relative novelty of the article 53 procedure, and the importance of the issues at stake, the Prosecution in the exercise of its discretion under article 53(3)(a) and rule 108 has nevertheless further considered whether any argument raised by the Comoros or the victims in the recent litigation should in any event lead to a new conclusion.

97. In this context, the Prosecution has given fresh consideration to the following seven issues raised before the Pre-Trial Chamber, based on the information available at the time of publication of the Report:

- Relevance of allegations of live fire, prior to the boarding, to analysis concerning any plan or policy;
- Considerations related to the victims of the identified crimes;
- Relevance of allegations of mistreatment of detainees on Israeli territory;
- Relevance of alleged damage to CCTV cameras aboard the *Mavi Marmara*;

- Considerations related to the occurrence of the identified crimes uniquely aboard the *Mavi Marmara*;

- Nature of the identified crimes aboard the *Mavi Marmara*;

- Considerations related to the perpetrators of the identified crimes.

98. Each of these issues is addressed in turn. For the following reasons, none of these issues, either separately or cumulatively, leads the Prosecution to depart from its conclusions in the Report, or indeed shows that those conclusions were unreasonable, unfair, or legally incorrect.

II. 1. Relevance of allegations of live fire, prior to the boarding, to analysis concerning any plan or policy

99. The Report determined that there is a reasonable basis to believe that nine passengers aboard the *Mavi Marmara* were killed during the boarding operation and its immediate aftermath, one later died as a result of his injuries,[173] and as many as 50-55 others were wounded.[174] All ten incidents which ultimately resulted in a fatality appear to have included the use of live ammunition, although live rounds do not always appear to have been the cause of death.[175]

100. From these facts, it follows that the use of live ammunition by the IDF in the course of the boarding operation has never been contested between the Prosecution, the Comoros, the victims, or the Pre-Trial Chamber.[176] Rather, the question which

[173] Report, paras. 38-39, 42.
[174] Report, paras. 42, 75.
[175] *See e.g.* Report, paras. 58-59. *See also* Annex D.
[176] For example, the Turkel Report estimated that "the Israeli forces discharged 308 [live] rounds (from the soldiers' testimonies, it appears that 110 rounds were shot aimed at persons; an estimated 39 hits were identified by the soldiers; out of which an estimated 16 participants were injured by shots to the center of mass), 87 [bean-bag rounds], and 264 paint ball rounds": Turkel Report, pp. 260, 263. The report further concluded: "the majority of the uses of force involved warning or deterring fire and less-lethal weapons. Of the total number of uses of force reported by the soldiers, 16 incidents of hitting the center of body ('center of mass') with rounds of live fire were reported": Turkel Report, p. 269. *See also* Palmer-Uribe Report, paras. 113 ("the overall nature of the enforcement operation is not in dispute"), 126-127.

arose in the litigation was whether the information available concerning the *timing* of the live fire affected the Prosecution's view that there was not a reasonable basis to believe that the identified crimes were committed according to a plan or policy.[177]

101. If the Prosecution had concluded that there was a reasonable basis to believe that the identified crimes were committed according to a plan or policy, such a conclusion would have been relevant to, although still not necessarily dispositive of, its analysis of the gravity of the identified crimes.[178]

102. From the outset, the Report expressly noted that the information available concerning the first use of live ammunition by the IDF is conflicting and unclear. The Report stated:

> It is noted that by some accounts of passengers, live ammunition was fired from both the Morena speedboats and helicopters, including possibly prior to the boarding, resulting in the killing and injuring of some individuals. By contrast, the Turkel Commission concluded that no firing from helicopters took place and that the only force used by soldiers from the helicopters was flash bang grenades that were deployed from the first helicopter in the initial stages of the fast-roping in an attempt to stop the passengers on the deck below from interfering with the ropes. The Turkel Commission also concluded that during the operation, the IDF soldiers alternated between lethal and non-lethal force as needed to protect themselves and other soldiers, depending on the threat posed. Overall, *the information available makes it difficult to establish the exact chain of events in light of the significantly conflicting accounts* of when live ammunition was first used and from where it emanated.[179]

103. In responding to the Comoros before the Pre-Trial Chamber, the Prosecution further clarified that its assessment of the conflicting evidence was not unreasonable,

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[177] By "live fire" in this context, the Prosecution refers to the use of live (*i.e.* lethal) ammunition with the intent to wound or to kill.
[178] *See* Report, paras. 137, 140.
[179] Report, para. 41 (citations omitted, emphasis added). *See also* fn. 72. *See further* Palmer-Uribe Report, para. 121 ("It is clear from both reports that stun and smoke grenades were fired onto the deck from the speed boats and helicopters before boarding had commenced in order to dispel resistance by the passengers. The [Turkel] Report also confirms that beanbag[] and paintball rounds were fired from the speedboats during the initial boarding attempt […] But we are unable to conclude whether this included live fire during the initial stages of the boarding attempt").

and emphasised its view that, even if live fire had been employed immediately prior to the boarding of the *Mavi Marmara*, this did not *ipso facto* establish a reasonable basis to believe the crimes were committed according to a plan or policy:

> Even the witnesses cited by the Comoros agree that the IDF employed a variety of weapons and tactics—including weapons which may be hard to differentiate from one another, given the loud noises which might be emitted by lethal and less-lethal weapons alike, the general confusion, the use by the IDF of specific means and methods to confuse and disorient (such as 'flash-bang' grenades), and the poor (pre-dawn) visibility. Furthermore, the information provided by these witnesses is ambiguous in some respects. Nor does the Comoros address the fact that other witnesses to the boarding operation did not state that live fire commenced before the boarding.
>
> In any event, even if the IDF had employed live fire immediately prior to the boarding of the *Mavi Marmara*, this still does not show that the Prosecution was unreasonable in concluding that there was no reasonable basis to believe that the Identified Crimes were committed systematically or pursuant to a plan. There is no information in the Prosecution's possession that any such live rounds were deliberately targeted at passengers, as opposed to warning shots, nor is there information that use of such live rounds in this fashion was authorised or planned.[180]

104. The Prosecution thus did not absolutely exclude the evidence of possible live fire before the boarding operation.[181] It merely recognised that this evidence had to be treated with caution. The circumstances of the incident as a whole made it reasonable, and even likely, that witnesses of all backgrounds might be honestly mistaken as to the exact sequence of events.[182]

105. The Prosecution further stresses that it drew no conclusion as the origin of live and/or less-lethal fire, since this was not material (in the circumstances of this case)

[180] Prosecution Response to Comoros, paras. 82-83 (citations omitted). *See also* Prosecution Response to Victims, paras. 66, 141.
[181] Prosecution Response to Victims, para. 54 (first bullet point). *See also* para. 66.
[182] *See also e.g.* Turkel Report, p. 265 ("the incidents on May 31, 2010, involved many participants, took place at night in several different locations and on a number of decks, and, according to the soldiers' testimonies, the violence surprised them with respect to its intensity").

to its assessment of the existence of any plan or policy for the commission of the identified crimes.

106. In the following paragraphs, some key aspects of the Prosecution's reasoning are briefly set out.

II. 1. a. The circumstances only permit a brief period for live fire to have occurred before the first IDF troops set foot on the Mavi Marmara

107. The Prosecution recalls the general timeline of the boarding operation, set out in Annex B. This featured two distinct efforts to board the *Mavi Marmara*.

108. The first effort, which was successfully repelled by the passengers, was made by fast boat. It is generally agreed that this attempt was initially made without warning. Within minutes, however, as this first effort failed, IDF members were employing noisy less-lethal weapons, in addition to the noise made by the defending passengers.[183]

109. The second effort was made by helicopter very soon after, and subsequently reinforced by fast boat after some 30 minutes.[184] It ultimately led to the take-over of the *Mavi Marmara*, and the various allegations addressed in the Report. It is uncontested that the second effort at least began with the use of flash-bang grenades to facilitate the ingress of IDF troops to the upper deck of the *Mavi Marmara*. It is uncontested that the noisy second effort was made "just minutes" after the noisy failure of the first effort.[185] And it is uncontested that, almost immediately after the first IDF troops landing on the upper deck encountered resisting passengers, IDF troops used less-lethal and then live fire.

[183] *See* Report, para. 40; Annex B.
[184] *See* Report, paras. 40-41; Annex B.
[185] *See* UNHRC Report, para. 114; Annex B.

110. The allegations of live fire 'before the boarding operation' thus relate to a period of, at most, two or three minutes *between* the first and second attempts at boarding.[186] That time period was also characterised by noise, violence, and confusion, immediately beforehand and immediately thereafter. Indeed, the available information does not specify whether there was any respite at all in the noise in this intervening period.

111. In these circumstances, there is a significant possibility that the sounds of the failed first boarding effort could be mistaken for fire preceding the second boarding effort, occurring a few minutes later.

II. 1. b. Differentiating the intentional use of lethal weapons and tactics from less-lethal weapons and tactics would, in the circumstances, have been very difficult

112. The ranged (i.e., projectile) less-lethal weapons used by the IDF in boarding the *Mavi Marmara* comprised: paintball guns, 'beanbag rounds' fired from a 12-gauge shotgun (also known as 'soft baton rounds'), Tasers, and 'flash-bang' grenades.[187] According to the Turkel Report, the IDF elected not to use hard 'baton rounds' or CS gas due to concerns about safety and effectiveness.[188]

113. The ranged lethal weapons carried by the IDF in boarding the *Mavi Marmara* are said to have included 9mm Glock pistols, 9mm mini-Uzi sub-machine guns, and 5.56mm M-16 rifles. The mini-Uzi can be fired either in single-shot or automatic mode.[189]

[186] *See* Annex B.
[187] Report, para. 41. *See also* Turkel Report, pp. 258-259.
[188] Turkel Report, p. 259. The Prosecution notes that a considerable number of witnesses allege the use of "gas" by the IDF, although this was rejected by the Turkel Commission: Turkel Report, pp. 258-260; *but see also* p. 179 (alleging that "tear gas" and "gas masks" were later found aboard the *Mavi Marmara*)).Consistent with these observations, a number of witnesses referred to the effects of the helicopters' downdraft. Just five persons (V94, V195, V226, V332, W2) make an allegation which might be consistent with first-hand experience of any use of gas.
[189] *See* Turkel Report, p. 260.

114. The Prosecution notes that the Turkish ballistic analysis subsequently provided by the Comoros (in January 2016), based on items recovered from the *Mavi Marmara*, is consistent with the use by the IDF at least of paintball guns, beanbag rounds, and 9mm calibre firearms.[190] Autopsy reports of the deceased victims are also consistent with the use of 9mm calibre firearms and beanbag rounds.[191]

115. Lay witnesses will have significant difficulty in differentiating between the sound of some of these lethal and less-lethal weapons.[192] For example, single shots fired with live ammunition and single shots fired with less-lethal ammunition (shotguns firing beanbag rounds) may both sound like typical gunshots. The use of flash-bang grenades—which stun and disorient those nearby, and which are characterised by a very loud detonation—would further impede distinctions made on the basis of sound.

116. The Prosecution notes that automatic fire—which could only emanate in these circumstances from the 9mm mini-Uzi—could in principle be a distinctly recognisable sound. However, although some witnesses do seem to refer generally to hearing such fire,[193] the physical evidence regarding the condition of the *Mavi Marmara*, and the extent of the reported injuries, suggests that such use, if any, was very limited.[194]

117. Visual distinction between the use of lethal and less-lethal ranged weapons would also generally have been difficult. For example, it would be incorrect for

[190] The forensic analysis appears to identify the items recovered as follows: 3 used shotgun cartridges, fired from 2 weapons; 3 unused shotgun cartridges (beanbag rounds); 17 used beanbag rounds; 7 used 9mm shells; 4 9mm bullets or bullet fragments; 28 or 29 unused 9mm rounds; 94 glass beads; 16 unused paintball capsules; 2 used paintball capsules. The "glass beads" are understood to be marbles: *see* Report, para. 40 (referring to the use by some passengers of "slingshots (used with metal and glass balls)". *See also below* fn. 438 (concerning the P1 Report).
[191] 8 bullets were recovered from the bodies of the victims, and all were assessed to be of 9mm calibre. In addition, 1 beanbag round was recovered, assessed to be fired from a 12-gauge shotgun. *See* Annex D.
[192] *See also below* paras. 268-272 (concerning the M1 report).
[193] *See e.g.* Annex C, paras. 18 (V285), 41 (V321).
[194] *See also* Turkel Report, p. 260 ("The mini-Uzi, which is capable of automatic fire, was only used in the single shot mode throughout the operation").

witnesses to assume that longer-barrelled weapons were necessarily lethal weapons—tactical shotguns, which fire the less-lethal 'beanbag rounds', typically have a barrel almost twice the length of the (potentially lethal) 9mm mini-Uzi, and approximately four times the length of a pistol barrel, such as the 9mm Glock. Similarly, there is potential for confusion between the more compact lethal weapons (Glock and mini-Uzi) and the more compact less-lethal guns which fired paintball pellets.

118. The Prosecution further notes in this context that the boarding operation occurred at dawn, when visibility was still very limited. Again, the use of 'flash-bang' grenades, which generate a blinding flash, would also have interfered with the vision of onlookers. Likewise, to the extent witnesses moved between areas of light and shadow aboard the *Mavi Marmara*, or looked at dark objects against dark backgrounds, this would also significantly impair their ability to make rapid and reliable identifications in chaotic circumstances.

119. Even accepting that witnesses could reliably identify when lethal weapons were employed, there is a further limitation on witnesses' ability to appreciate when those weapons were being used with lethal intent. The Turkel Report states that the IDF used both "warning shots and deterring fire" as part of "a graduated use of force".[195] In particular, deterring fire—a tactic which is expressly *intended to seem* threatening—may readily be mistaken for an act with lethal intent. The Prosecution notes the explanation in the Turkel Report that, in contrast to "warning" fire, "deterring fire is aimed at a safe location but *close* to an individual in order to provide a more direct warning" (emphasis added).[196] In such circumstances, it may be difficult for a

[195] *See* Turkel Report, p. 260. *See also* pp. 268-269 ("the majority of the uses of force involved warning or deterring fire and less-lethal weapons"). *See further* Annex B. The Prosecution notes in this context that the Turkel Commission had at least some access to IDF personnel and records, thus presenting some information which would otherwise be unavailable (such as IDF accounts of the way in which live fire was used). Where relevant, the Prosecution has duly noted this information. For the same reasons, however, and mindful that this information cannot by its nature be corroborated at the present time, this information is treated with caution.
[196] Turkel Report, p. 260, fn. 295.

witness to distinguish between live fire which is intended to be lethal, or otherwise harmful, and fire which is intended to deter and intimidate. This is especially the case if the fire is conducted at anything other than very close range.[197]

II. 1. c. In the circumstances, the information identified by the Comoros concerning 'pre-boarding' live fire must be treated with caution

120. In litigation before the Pre-Trial Chamber, the Comoros identified five witnesses available to the Prosecution which it considered to support the use of live fire *before* IDF soldiers had landed on the upper deck of the *Mavi Marmara*: V58, V228 (who was aboard another vessel), V285, W13 and O12.

121. In January 2016, the Comoros subsequently referred the Prosecution to five further relevant witnesses whose statements were *already* in the Prosecution's possession: V92, V115, V268, V321, and V343. Additional statements, provided to the Prosecution *after* the Report was published, are considered separately below.[198]

122. The Prosecution has reviewed its analysis of these ten witnesses.[199] For the following reasons, it considers their assertions concerning the widespread use of live fire prior to the boarding operation must be treated with particular caution, both having regard to the content of the information itself and the circumstances prevailing aboard the *Mavi Marmara* at the material time.[200]

- Four of the ten witnesses (V58,[201] V268,[202] V343,[203] and O12[204]) were actively participating in the resistance aboard the *Mavi Marmara* at the material times,

[197] The autopsy reports show that one of the ten deceased victims suffered one gunshot wound which was likely delivered at close range (less than 35-45 cm if a short-barrelled weapon was used; less than 75-100 cm if a long-barrelled weapon was used). For the other gunshot wounds whose ranges could be estimated, all were likely delivered at distant range (greater than 35-45 cm if a short-barrelled weapon was used; greater than 75-100 cm if a long-barrelled weapon was used). *See* Annex D.
[198] *See below* paras. 263-275.
[199] For a summary, *see generally* Annex C.
[200] *See above* paras. 107-119.
[201] *See* Annex C, para. 7 (acknowledging that he was "fighting with Israeli soldiers").
[202] *See* Annex C, para. 36 (acknowledging that he "participated in the resistance against the Israeli soldiers").

and three (V58, V268, and V343) were wounded as a result.[205] Although these witnesses may have been physically present in relevant locations, their attention would necessarily have focused primarily on their own immediate circumstances. This substantially increases the likelihood that their perceptions about broader events may have been mistaken. There is also a heightened risk of bias, both to justify their own actions and potentially to impugn the conduct of the IDF.

- At least two witnesses make what appears to be an obvious mistake in recalling the order of material events. If these mistakes were resolved, their information would not support the allegation concerning 'pre-boarding' live fire. Thus, O12's assessment of the time he came across Cevdet KILICLAR, who was killed, is doubtful both in light of his own other recollections and other information, such as the account of W13.[206] Similarly, V285 attributes his injury to "machine gun" fire from helicopters before the boarding, but the wound he describes is not clearly consistent with such a cause.[207]

- Four of the ten witnesses, by their own accounts, had no opportunity to observe the relevant events directly. As such, their information can be given little weight. O12 was initially at the stern of the *Mavi Marmara*, and only arrived at the upper deck when IDF troops had already boarded.[208] He clarified that he only came across the body of Cevdet KILICLAR after he had been killed.[209] W13 did not see any person hit by ammunition that he identified as live ammunition; rather, he inferred the use of live ammunition

[203] *See* Annex C, para. 28 (acknowledging that he "hit one soldier with the stick in my hand", and that he helped to get an Israeli soldier "to the lower deck").
[204] *See* Annex C, para. 1 (acknowledging that he was involved in "defending the ship").
[205] *See* Annex C, paras. 7 (V58 was shot with live ammunition after he began fighting), 28-29 (V343 was shot in the arm with one live round and in other locations with less-lethal rounds after he began engaging in the resistance), 34, 36 (V268 was shot, including with live ammunition but not knowing "what weapon or what distance I was shot from" after he would have been seen "fighting their soldiers").
[206] *See* Annex C, paras. 1-6. *See further* Annex D.
[207] *See* Annex C, para. 21 (exit wound "30 cm higher" than entry wound).
[208] *See* Annex C, para. 1.
[209] *See* Annex C, paras. 1, 6.

from the injuries he later saw.[210] V228 was a passenger aboard the *Gazze I*, not the *Mavi Marmara*, and his account was based on his view from more than 200 metres distance, with reduced visibility and obstructions, using binoculars from a moving deck.[211] V268 was praying when the boarding began, and arrived at the upper deck when IDF troops had already boarded.[212]

- Six of the ten witnesses (V58,[213] V92,[214] V115,[215] V228,[216] V285,[217] and V321[218]) simply fail to give a reasonable explanation for their belief that passengers were targeted with live fire by the IDF before the boarding. As such, their information can be given very little weight.

- Two of the ten witnesses acknowledge their own limited perceptions. Thus, V228 not only acknowledged the impediments to his observations (due to his presence on a different ship, etc.) but also that he made mistakes in his observations (confusing life jackets floating on the sea for people).[219] V343 recalled that there was "such a chaos and confusion" aboard the *Mavi Marmara* that even "one of my friends attempted to punch me".[220] This bolsters their credibility in some respects but limits the probative value of their accounts in others.

[210] *See* Annex C, paras. 11-17.
[211] *See* Annex C, paras. 22-24.
[212] *See* Annex C, paras. 34, 36, 38-40.
[213] *See* Annex C, paras. 7, 9 (concluding that live ammunition was used prior to the boarding on the basis that people fell to the ground). By comparison, W13 also observed people falling, but inferred that this was from the use of less-lethal ammunition: *see e.g.* Annex C, para. 12.
[214] *See* Annex C, paras. 31-33 (waking from sleep at an unknown position on the *Mavi Marmara*—but, by necessary implication from his account, on a lower deck—at a time when there was already "a panic, a hustle and bustle", and seeing the IDF "open[ing] fire" from "boats and helicopters"; providing no explanation whether this referred to live ammunition or less-lethal ammunition, or how he could tell).
[215] *See* Annex C, paras. 46-47 (asserting that a helicopter was "shooting at the ship", but not explaining his own position or whether his reference to "shooting" meant live ammunition or less-lethal ammunition).
[216] *See* Annex C, para. 22 (concluding that the IDF were "firing at people" because he "was shocked by what I saw through my binoculars", but explaining neither what he actually saw or when he saw it).
[217] *See* Annex C, paras. 18-21 (asserting that "machine gun[]" fire was employed from the helicopters, but not explaining his own location).
[218] *See* Annex C, para. 43 (asserting that "Israeli soldiers were shooting at us from one of the helicopters", but providing only a broad narrative of alleged events aboard the *Mavi Marmara*, rather than explaining his own movements, actions, and observations).
[219] *See* Annex C, para. 22.
[220] *See* Annex C, para. 30.

- Conversely, three of the ten witnesses do not acknowledge obvious limits to their own perceptions, suggested by the available information. V58 and V343, and possibly W13, were present on the upper deck of the *Mavi Marmara* before the IDF troops boarded, when flash-bang grenades were deployed in that area.[221] Such devices create a blinding flash, a very loud explosive noise, and are intended to disorient, confuse, and stun. Although V58 and V343 acknowledge that these devices were used, they make no reference to any effect of these devices upon them, nor do they explain how they avoided such effects.[222] Accordingly, this limits the credibility of these witnesses.

- Information provided by four of the ten witnesses (V228, V268, V285, and V321) is otherwise vague or equivocal,[223] or apparently exaggerated in light of the other information available.[224]

123. The Prosecution stresses that it makes some of this analysis of individual witnesses public in the interests of transparency, and having particular regard to the public statements made by the Comoros, as well as the majority of the Pre-Trial

[221] *See* Annex C, paras. 7 (V58 stating that he was "upstairs" at his "spot", wearing a "gas mask" and "waiting" for boarding, and then referring to "tear, sound, smoke and gas bombs" preceding further action from the helicopters), 12 (W13 ran to the upper deck with 25-30 other men when he saw an approaching helicopter), 26 (V343 was on the "top deck", wearing a gas mask, and recalled the use of "gas and sound bombs"). *See also* Annex C, paras. 18, 20 (V285 referring to the use of "gas and smoke" bombs), 22 (V228 hearing the sound of "bombs" from the *Gazze I*), 31 (V92 referring to "smoke, noise and gas bombs"), 34 (V268 hearing "big explosions"), 41 (V321 referring to "sound bombs, smoke bombs, light bombs, gas bombs").Concerning the alleged use of gas, *see above* fn. 188.
[222] *See* Annex C, paras. 9 (V58), 17 (W13), 30 (V343).
[223] *See e.g.* Annex C, paras. 22, 24-25 (V228 concluded that the IDF were "firing at people" but does not explain when, or the basis upon which he reached this conclusion from the *Gazze I*), 34-39 (V268 is equivocal as to when the IDF started shooting, and concluded that fire was coming from helicopters only on the basis that he saw the "laser targeting red light"; however, he does not explain how he knew that the laser originated on the helicopters, the type of weapon associated with the laser targeting beams, or whether the weapons were actually fired, as opposed to merely aimed).
[224] *See e.g.* Annex C, paras. 18-20 (V285 stating that "the entire ship" was "bombed" with "gas and smoke bombs", and that "soldiers fired on us with machine guns"), 41-45 (V321 stating that "Israeli soldiers pulled out the bullets they call plastic from the bodies of the injured themselves, without medical procedure, and with knives, torturing the injured", that the use of "[s]ound bombs, smoke bombs, gas bombs, and light bombs" created shrapnel causing "serious wounds" to "many" people, and that "machine guns" were fired from both boats and helicopters).

Chamber.[225] This is without prejudice, however, to the Prosecution's more general view (as expressed in the Report) that, *even if this evidence were accepted to be reliable*, there remains no reasonable basis to infer the existence of a plan or policy, considering the circumstances as a whole.[226] As such, these witnesses' allegations concerning the timing of the use of live fire remain immaterial to assessing the gravity of the Identified Crimes.

> *II. 1. d. Even accepting the 'pre-boarding' live fire allegations* arguendo*, there is no reasonable basis to believe the identified crimes were committed according to a plan or policy*

124. Even if it were to be accepted *arguendo* that some IDF soldiers did open fire with live ammunition before the first troops set foot on the upper deck of the *Mavi Marmara* (*i.e.* the commencement of the second boarding effort) this does not establish a reasonable basis to believe, in the circumstances, that the identified crimes were committed according to a plan or policy. Considering all the available information, the Prosecution does not consider that there is a reasonable basis for such a conclusion.

125. To the contrary, given the overall pattern of events, including the progression from the first to the second boarding effort, and the manner in which the second effort was executed, there is no reasonable basis to believe that the IDF operation went according to plan, much less that the identified crimes were committed according to a plan or policy.

[225] *See e.g.* Request, para. 33 ("The Comoros submit that '[t]here is information available to the Prosecutor that the IDF fired live ammunition from the boats and the helicopters before the IDF forces boarded the *Mavi Marmara*, which is plainly consistent with a deliberate intent and plan to attack and kill unarmed civilians' […] This information consists of the statements of several persons who were on board of the vessels of the flotilla (named and quoted in the Request for Review), the conclusions of the UN Human Rights Council fact-finding mission (also quoted in the Request for Review), and autopsy reports, which, according to the Comoros, 'indicate that persons were shot from above' […]. In her Response, the Prosecutor does not contest that the information pointed to by the Comoros is available to her, nor does she argue that this information is anyhow misrepresented in the Request for Review.").
[226] *See below* paras. 124-126.

126. Indeed, the existence of a plan or policy to commit the identified crimes, including wilful killing, would appear to be inconsistent both with the IDF's graduated approach to the boarding operation, and the use of less-lethal means to try and clear the upper deck before the first IDF troops fast-roped onto the *Mavi Marmara*.[227]

II. 2. Considerations related to the impact of the identified crimes, and the victims

127. During the litigation before the Pre-Trial Chamber, both the Comoros and OPCV, on behalf of certain victims, suggested that the Prosecution had erred in appreciating the number of victims of the identified crimes, and the impact upon them. The Pre-Trial Chamber, however, recognised that "the Prosecutor and the Comoros essentially agree on the numbers of victims of the identified crimes".[228] There is indeed no dispute that ten persons died as a result of the events aboard the *Mavi Marmara*, and 50-55 persons sustained injuries.

128. Both the Comoros and the victims represented by OPCV highlighted the observation in the Report that, in contrast, "[b]ased on the available information, at this stage, the *precise or even approximate* number of passengers who were victims of outrages upon personal dignity is unclear" (emphasis added).[229] However, this neglects the footnote immediately following this observation which added:

> In characterising these events, the Palmer-Uribe Panel characterised the mistreatment of passengers as 'significant' and referred to 'many' passengers as having been subjected to various forms of mistreatment.[230]

129. It was on this basis that the Prosecution assessed the number of victims.[231] The reference to ambiguity concerning the "precise or even approximate" number of victims referred to the Prosecution's inability to determine an *exact* number of

[227] *See further below* paras. 268-272 (concerning the M1 Report).
[228] Request, para. 26. *See also above* para. 76.
[229] Report, para. 138. *See also* Request, para. 25.
[230] Report, para. 138, fn. 239.
[231] *See also* Prosecution Response to Comoros, para. 65; Prosecution Response to Victims, para. 107.

victims on the basis of the information available, nor even *an estimate* to the nearest ten or fifty. Yet the Report leaves no doubt, nonetheless, that the number of alleged victims of outrages upon personal dignity could be described as "many" of the more than 500 passengers aboard the *Mavi Marmara*. The Pre-Trial Chamber reached a similar conclusion, referring to "possibly hundreds of instances of outrages upon personal dignity".[232] Accordingly, nothing requires or justifies reconsideration of the Report in this respect.

130. The Comoros and the victims represented by OPCV also contended that persons who were not aboard the *Mavi Marmara* should be considered as victims. The Prosecution, however, found no reasonable basis to believe crimes were committed on either of the other vessels upon which it has jurisdiction (the *Sofia* and the *Rachael Corrie*).[233] Accordingly, in determining the number of direct victims, it could only identify those persons aboard the *Mavi Marmara*. Nor did the Report fail to take into account the effect upon indirect victims.[234] It stated:

> The alleged crimes clearly had a significant impact on victims *and their families and other passengers involved*, who suffered physical and/or psychological or emotional harm as a result of the alleged crimes.[235]

131. In this context, the Prosecution does not agree that recognition of the "significant impact" upon direct and indirect victims did not "as such" indicate sufficient gravity, as the majority of the Pre-Trial Chamber concluded.[236] To the contrary, the weight afforded to this conclusion, in the circumstances, was closely related to the assessment of the 'scale' of the crimes, which—as previously stated—

[232] Request, para. 26.
[233] Report, paras. 79, 82. *See also* Prosecution Response to Comoros, para. 66; Prosecution Response to Victims, para. 109.
[234] *See* Prosecution Response to Victims, paras. 108-109.
[235] Report, para. 141 (emphasis added).
[236] Request, para. 47.

was relatively small compared to potential cases arising from other situations, notwithstanding the hardship and suffering caused to the persons involved.[237]

132. Furthermore, the Prosecution did not accept that the identified crimes had a significant impact on the civilian population of Gaza. In particular, notwithstanding the interception of the flotilla, it found that "the supplies carried by the vessels in the flotilla were ultimately later distributed in Gaza".[238] This conclusion has not been challenged.

133. The emphasis by the Comoros upon the symbolic importance of the identified crimes aboard the *Mavi Marmara* must also be treated with caution. The majority of the Pre-Trial Chamber could identify this as no more than a "possibility",[239] and the Prosecution was in no position to assess such a claim on an objective basis.[240] It is in no better position to do so now, in 2016-2017. Moreover, the majority of the Pre-Trial Chamber's reference to "the international concern caused by the events at issue" sheds no more light on the question.[241] The Appeals Chamber has in the past specifically cautioned that the concept of "'social alarm' depends upon subjective and contingent reactions to crimes rather than upon their objective gravity".[242] Similarly, just as social alarm cannot itself be considered a proper criterion to assess the gravity of a case, it cannot be a reliable guide to the subjective reaction of a whole

[237] *See above* paras. 77-80.
[238] Report, para. 141.
[239] Request, para. 48.
[240] *See* Report, para. 147 ("The Office notes that the flotilla campaign in a broader sense was related to the humanitarian crisis faced by the civilian population of Gaza resulting from the overall restrictions and blockade imposed by Israel, insofar as the campaign sought to bring attention to this situation. While the situation with regard to the civilian population in Gaza is a matter of international concern, this issue must be distinguished from the Office's assessment which was limited to evaluating the gravity of the alleged crimes committed by Israeli forces on board the vessels"). *See also* Prosecution Response to Comoros, para. 99.
[241] Request, para. 48.
[242] *DRC* Arrest Warrants Appeal Decision, para. 72. *See also* Knoops and Zwart, at 1096-1097.

population to a particular event.[243] Indeed, these may be two sides of an identical coin.

134. For all these reasons, none of the arguments raised concerning the impact of the identified crimes, or the circumstances of the victims, leads the Prosecution to reach a new conclusion to that contained in the Report.

II. 3. Relevance of allegations of mistreatment on Israeli territory

135. Both the Comoros and the victims raised allegations concerning mistreatment of passengers from the *Mavi Marmara* while they were subsequently detained on Israeli territory prior to their deportation. However, the Court does not have territorial jurisdiction over events in Israel. Such events cannot be a basis to establish subject matter jurisdiction in themselves, therefore, but may only be taken into account, in certain circumstances, if they are relevant to conduct *within* the Court's jurisdiction. As the Prosecution has previously explained,

> [L]egal and factual analysis for the purpose of a preliminary examination should be confined, where feasible, to the territorial parameters of the Court's jurisdiction. There is an occasional exception to this principle when the facts of a situation show a rational link with the broader circumstances.[244]

136. The majority stated:

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

[243] In this context, the Prosecution notes that although the *Al Mahdi* Trial Chamber referred to the international community in assessing the gravity of the charged conduct in that case, it did not refer to the degree of alarm, but rather to the direct effect of the destruction of the protected objects on a core interest (UNESCO World Heritage sites) of the international community: *see above* fn. 130.

[244] Prosecution Response to Victims, para. 103. *See also* para. 82 ("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", citing ICTR, *Nahimana* AJ, paras. 310, 315); Prosecution Response to Comoros, paras. 53-54.

> crime, but *do not preclude the Court from considering facts that in themselves occur outside of its jurisdiction for the purpose of determining a matter within its jurisdiction*. Thus, the rules of jurisdiction do not permit the Court to conduct proceedings in relation to possible crimes which were committed elsewhere than on the three vessels falling into its jurisdiction, but *the Court has the authority to consider all necessary information*, including as concerns extra-jurisdictional facts *for the purpose of establishing crimes within its competence as well as their gravity*.[245]

137. In this respect, the views of the Pre-Trial Chamber and the Prosecution are not as different as they may initially seem. They both acknowledge that extra-jurisdictional conduct may only be considered to the extent it is necessary context to events over which the Court *does* have jurisdiction.[246] The Prosecution's formulation went further by making the practical point that, in undertaking its preliminary examination analysis, the Prosecution should take the Court's jurisdiction as its natural framework—unless the information available discloses a "rational" basis to look at a particular issue beyond that framework. In the Prosecution's view, such an approach is logical and necessary, since *every* event has a broader historical and geographical context. The Prosecution cannot practicably analyse all such context, and should not, unless it is necessary to resolve the matter at hand.[247] The Pre-Trial Chamber's statement does not contradict this conclusion.

138. On the facts of this situation, the Prosecution could not identify sufficient basis to make it necessary, in the Pre-Trial Chamber's words, to take into account subsequent events on Israeli territory in order to assess the gravity of the preceding conduct aboard the *Mavi Marmara*.

139. In particular, as the Prosecution stated:

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[245] Request, para. 17 (emphasis added).
[246] Whereas the Pre-Trial Chamber referred to the Court's ability to consider "necessary" information, the Prosecution referred to the possibility of taking account of information with a "rational link" to events within the Court's jurisdiction.
[247] *See also* Prosecution Response to Victims, para. 82 ("crimes falling within the Court's jurisdiction may often be preceded by or connected to a variety of other events").

> Nothing in this information [suggesting further mistreatment of some detainees once they arrived on Israeli territory] now suggests that the Prosecution was unreasonable to find that there was no reasonable basis to infer that the Identified Crimes […] were committed *systematically or on a planned basis*. Indeed, the information highlighted by the Comoros appears to concern a variety of Israeli personnel in a variety of locations and does not seem to relate especially to the IDF troops who boarded the Three Vessels, or persons in those troops' chain of command.[248]

140. Notably, the alleged conduct on Israeli territory was attributed not only to IDF members (and thus, persons at least within the same organisation as those who carried out the boarding of the *Mavi Marmara*) but also to "immigration officers" and "police". Likewise, the alleged conduct did not occur only at military installations but also civil facilities including Ben Gurion airport and domestic prisons.[249]

141. In such circumstances, the alleged subsequent misconduct, even if true, cannot be rationally associated with the identified crimes aboard the *Mavi Marmara*, for the purpose of assessing the gravity of any potential case arising from the situation. While there is a continuum between the victims of the alleged conduct, the link between the groups of alleged perpetrators is tenuous—they are united only by their nationality, their service to the Israeli government, and the allegations that some persons in these groups mistreated detainees. The conduct of such unrelated groups has very little or no probative value in showing a reasonable basis to believe that there was a plan or policy to commit crimes aboard the *Mavi Marmara*.[250]

142. Out of an abundance of caution, the Prosecution thus additionally clarified and emphasised:

> 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

[248] Prosecution Response to Comoros, para. 88 (emphasis added). *See also* Prosecution Response to Victims, para. 81.
[249] Prosecution Response to Comoros, para. 88, fn. 205.
[250] *See also below* para. 295 (concerning the M1 Report).

> represented *a continuation* of the outrages upon personal dignity which may have been committed by individual perpetrators aboard the *Mavi Marmara*.[251]

143. The majority of the Pre-Trial Chamber disagreed with the Prosecution's analysis in this respect, stating:

> Without an investigation proving the contrary, and on the basis of the limited information available to the Prosecutor, it is incorrect for her to conclude that *the systematic abuse* of detained passengers from the *Mavi Marmara* (*which she recognises*, but merely finds 'concerning') fits into the theory that the identified crimes occurred as individual excesses of IDF soldiers who boarded the *Mavi Marmara*. Rather, *such systematic abuse* reasonably suggests a certain degree of sanctioning of the unlawful conduct on the *Mavi Marmara*, at least in the form of tacit acquiescence of the military or other superiors.[252]

144. This statement, however, seems to be based on a mistaken premise.[253] The very point of the Prosecution's analysis, as just set out, was that there does *not* appear to be a reasonable basis to believe that any abuse of the *Mavi Marmara* passengers on Israeli territory was itself *systematic*, nor that any such conduct was relevantly associated with the identified crimes aboard the *Mavi Marmara*. The majority of the Pre-Trial Chamber does not explain or substantiate its view that "military or other superiors" tacitly acquiesced in the alleged abuse on Israeli territory (a matter about which there is simply no information), nor that those persons were the same persons responsible for the IDF troops which undertook the boarding operation.[254]

145. The majority was also mistaken in stating that the Prosecution considered the allegations of abuse on Israeli territory to "fit[] into the theory that the identified crimes occurred as individual excesses of IDF soldiers".[255] To the contrary, the Prosecution merely determined that—since the alleged conduct on Israeli territory

[251] Prosecution Response to Victims, para. 81 (emphasis added).
[252] Request, para. 38 (emphasis added).
[253] *See also above* para. 94.
[254] Logically, there would be a point where any Israeli officials would inevitably share a superior in common. However, this might occur very high up the chain of command indeed. The information available shows no reasonable basis to believe that any such common superior knowingly acquiesced in unlawful conduct. *See also above* para. 140.
[255] Request, para. 38.

could not reasonably be considered as relevant to the question whether the identified crimes were committed according to a plan or policy—it need not conduct a substantive analysis of the relevant allegations. The Prosecution thus did not seek to fit the allegations into one theory or another.

146. Moreover, similar reasoning, concerning the need for a "rational link" between extra-jurisdictional conduct and events under the Court's jurisdiction, led the Prosecution to the view that the general circumstances prevailing in Gaza in 2010 were not material to its assessment of the gravity of the identified crimes aboard the *Mavi Marmara* (except to the extent of any *resulting impact* upon the population of Gaza). Although the Comoros contested this approach,[256] it is significant that the Pre-Trial Chamber refrained from identifying any error in this respect, in contrast to its conclusion regarding the alleged mistreatment of detainees on Israeli territory.[257] Nor did the Pre-Trial Chamber find any error in the Report's approach to crimes against humanity, which reflects in part similar reasoning.[258]

147. Nothing in these circumstances, therefore, leads the Prosecution to determine that it should depart from the approach taken in the Report.

II. 4. Relevance of alleged damage to CCTV cameras aboard the Mavi Marmara, and the degree of force used during the boarding

148. In litigation before the Pre-Trial Chamber, the Comoros asserted that the destruction of CCTV cameras aboard the *Mavi Marmara* during the boarding, and the

[256] *See* Prosecution Response to Comoros, paras. 53-58.
[257] The Pre-Trial Chamber noted only that the Prosecution had determined that the *identified crimes* had no significant impact on the population of Gaza—with which it disagreed—but did not endorse the Comoros' argument that the events had to be considered in the context of Israel's broader policy towards Gaza: *see* Request, paras. 16-19, 46-48. *See further* Request for Review, paras. 77 (contending that the blockade itself was "a disproportionate and collective punishment of the civilians of Gaza"), 79 (referring to "evidence of crimes committed in other IDF operations to maintain the blockade and the occupation by Israel"), 130 ("[t]he Prosecutor should have taken into account that this blockade has been strongly condemned […] as a fundamental breach of international law which is wholly disproportionate and which collectively punishes and harms the civilians of Gaza"), 132 (asserting that "it is irrational and unjustified for the Prosecutor to disregard entirely the reason for the attack on the Flotilla and alleged wider plan and policy of which it formed a part").
[258] *See* Prosecution Response to Comoros, para. 56; Prosecution Response to Victims, paras. 94-98. Indeed, the majority of the Pre-Trial Chamber, in the Request, makes no reference to crimes against humanity at all.

confiscation of electronic media, represented a "deliberate attempt by the IDF to destroy evidence of crimes committed", and hence supported the existence of a plan or policy to commit the identified crimes.[259] Likewise, the Comoros pointed to the lethal force used by the IDF during the course of boarding the *Mavi Marmara* as further evidence of such a plan or policy.

149. The Prosecution responded to the Comoros' argument by noting generally that not "all evidence of criminality is also evidence of a plan".[260] In this context, it recognised that the "disabling of CCTV cameras" may have been consistent with criminal behaviour.[261] Information suggesting that some IDF troops "may have acted in a violent, criminal or otherwise suspicious fashion" is likewise consistent with criminal behaviour.[262] For these reasons, the Prosecution concluded that the Comoros had failed to show any "fault in the Prosecution's analysis"—in other words, applying the appropriate standard of review,[263] it had not been shown that the Prosecution's analysis was *unreasonable*.[264]

150. The majority of the Pre-Trial Chamber subsequently stated that:

> [T]he question […] is not whether the apparent cruelty is compatible with the interpretation implied by the Prosecutor (excess of the individual IDF soldiers) or with the interpretation rejected by the Prosecutor and insisted on by the Comoros (action resulting from a deliberate plan). In the view of the Chamber, it is compatible with both, as is the information that the IDF forces who carried out the identified crimes attempted to conceal the crimes. Thus, the Prosecutor erred in not recognising one of the alternative explanations of the

[259] Request for Review, para. 124.
[260] Prosecution Response to Comoros, para. 85.
[261] Prosecution Response to Comoros, para. 85.
[262] Prosecution Response to Comoros, para. 85. *See also* Prosecution Response to Victims, para. 113 ("[w]hereas it may be inherent in offences such as wilful killing, wilfully causing serious injury, and outrages upon personal dignity 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").
[263] *See above* paras. 36-68.
[264] Prosecution Response to Comoros, para. 85; Prosecution Response to Victims, para. 113.

available information, on the absence of which she then relied in concluding that the gravity requirement was not met.[265]

151. This analysis seems to confuse arguments based on the standard of review with the substantive analysis originally undertaken in the Report. The dispute between the Prosecution and the Comoros was whether or not the facts identified by the Comoros demonstrated that the Prosecution was *unreasonable* to conclude that there was no reasonable basis to believe the identified crimes were committed according to a plan or policy. The Prosecution recognised the facts but concluded that they did not show the Report to be unreasonable because they were consistent with the Prosecution's conclusion (no plan or policy),[266] even though they were *also* consistent with the Comoros' conclusion (there was a plan or policy). The majority of the Pre-Trial Chamber reached the same conclusion, noting that these facts are indeed "*compatible with both*".[267]

152. Yet the majority nonetheless concluded that the Report was erroneous because, supposedly, it relied upon the "*absence*" of relevant alternative explanations (for the destruction of the CCTV cameras and the amount of force employed) to conclude "that the gravity requirement was not met".[268] But this was not the reasoning underlying the Report.

153. To the contrary, first, the conclusion that there was not a reasonable basis to believe the identified crimes were committed according to a plan or policy was not the only factor underpinning the Prosecution's gravity assessment.[269] Second, the

[265] Request, para. 41.
[266] *See e.g.* Prosecution Response to Victims, para. 113 ("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", emphasis added).
[267] Request, para. 41 (emphasis added).
[268] Request, para. 41 (emphasis added).
[269] *See* Report, para. 148 (concluding that no potential case arising from the situation would be admissible "based on the foregoing considerations"). *See further* paras. 133-147 (considering, in addition to the manner in which the identified crimes were committed, factors including their scale, the impact upon victims, and the limited qualitative considerations which might make potential cases of small scale sufficiently grave).

Prosecution reached this conclusion concerning any plan or policy based on the circumstances of the interception and boarding operation itself, including but not limited to the occurrence of the identified crimes only aboard the *Mavi Marmara*, the context of violent resistance aboard the *Mavi Marmara*, the manner in which the boarding operation was conducted, and so on.[270] Third, although the destruction of the CCTV cameras and the degree of force used *could be consistent* with either the existence or absence of a plan or policy, these facts *in themselves* were not considered sufficient—in the context of the other available information—to establish a reasonable basis to believe that such a plan or policy existed.

154. For these reasons, the Prosecution considers that departure in this respect from the conclusions of the Report is neither required nor justified.

II. 5. Considerations related to the occurrence of the identified crimes uniquely aboard the Mavi Marmara

155. In the Report, the Prosecution recalled that:

> In addition to the *Mavi Marmara*, the IDF forces also took control of other vessels in the flotilla. The boarding and takeover of these other vessels was also conducted by the use of force. However, the information available indicates that the level of force used by IDF soldiers in the course of these takeovers was significantly lower than that used on the *Mavi Marmara*. Passengers on these other vessels offered limited or no violent resistance in response to the takeovers by the IDF. The information available indicates that although some of these passengers also sustained injuries, no significant serious injury or loss of life occurred on these other vessels in the flotilla.[271]

156. During the litigation before the Pre-Trial Chamber, the Comoros challenged the Prosecution's assessment of this information, maintaining that there was a reasonable basis to believe crimes similar to those identified on the *Mavi Marmara* occurred on other vessels. In response, the Prosecution noted that the accounts relied

[270] *See* Report, para. 140. *See also e.g. above* paras. 34, 88-93, 123-126; *below* paras. 155-159.
[271] Report, para. 78.

upon by the Comoros were consistent with the Report and did not show that the Prosecution's analysis was unreasonable.[272] In particular, concerning the UN Human Rights Council's report ("HRC report"), the Prosecution recalled:

> [T]he HRC report does not support the Comoros' assertion that 'abuse and mistreatment' occurred on 'each of the seven ships within the Flotilla'. To the contrary, the HRC made no adverse findings concerning the boarding of the *Defne*, *Gazze I*, or *Rachael Corrie*.
>
> Consistent with the Prosecution's analysis, the HRC emphasised unlawful behaviour by IDF troops aboard the *Mavi Marmara*. Although the HRC found that the force used in intercepting and boarding the *Sofia*, the *Challenger I*, and the *Sfendoni* was 'unnecessary, disproportionate, excessive, and inappropriate', it reached this conclusion in the context of its finding that the interception of the flotilla was *per se* unlawful, and by reference to the standards applicable to civilian law enforcement. By contrast, as explained above, the Prosecution found it necessary only to make a conditional determination of the lawfulness of the interception of the flotilla.
>
> Whereas the HRC considered that detainees aboard the *Mavi Marmara* were generally mistreated and in various ways, for other vessels in the flotilla, it raised concern primarily with the use of handcuffing 'to an extent' on the *Sofia*, the *Challenger I*, and the *Sfendoni*.[273]

157. The majority of the Pre-Trial Chamber accepted the assessment of this information in the Report, stating that "while there is indication that some force was

[272] *See* Prosecution Response to Comoros, para. 90, fn. 212.
[273] Prosecution Response to Comoros, paras. 91-93 (citing UNHRC Report, paras. 152-153, 159-160, 163-173, 178-179, 181). *See also* para. 90, fn. 212 (noting that the *Challenger I*, following the boarding of the *Mavi Marmara*, initiated evasive manoeuvres). Concerning the *Sofia*, the *Challenger I*, and the *Sfendoni*, the Prosecution further recalled: "Aboard the *Sofia*, the HRC noted evidence that all passengers and crew were restrained, and some were roughly treated or assaulted […]. Aboard the *Challenger I*, the HRC noted evidence that passengers were denied access to toilet facilities, in some cases handcuffed, and two women were hooded […]. Aboard the *Sfendoni*, although some passengers were restrained for an initial period, most were not. Passengers were permitted access to toilet facilities and to food, and witnesses said nobody was ill-treated or restrained […]. There is also some evidence that restraints may have been justified, at least in some cases: one passenger, initially restrained, jumped into the sea as soon as the restraints were removed, and was then recovered […]": Prosecution Response to Comoros, para. 93, fn. 220 (citing UNHRC Report, paras. 141, 145-147, 150).

used against the persons also aboard the other vessels of the flotilla, the events aboard the *Mavi Marmara* were indeed unique."[274] However, it continued to state:

> [I]t does not follow that this is a factor militating against the conclusion that the identified crimes occurred pursuant to a plan. Only an investigation would provide the necessary information to determine whether any other reasonable explanation exists. In fact, the *Mavi Marmara* differed greatly from the other vessels of the flotilla in that it carried at least 546 activists, i.e. approximately 80% of the people of the entire flotilla, including 'activists' allegedly linked to the Hamas according to some accounts […] and did not carry humanitarian supplies […]. Even if both the *Mavi Marmara* and the []*Sofia* 'clearly and intentionally refused to stop' […], the level of violence used by the IDF against the *Mavi Marmara* and its passengers was significantly higher and qualified as totally unnecessary and incredible […]. It is *reasonable to consider these circumstances as possibly explaining* that the *Mavi Marmara* was treated by the IDF differently from the other vessels of the flotilla from the outset. Without an investigation, it is impossible to conclude, as the Prosecutor does, that the absence of crimes aboard the other vessels comparable to those aboard the *Mavi Marmara* is a factor that would negate, or militate against, the possibility that the identified crimes resulted from a deliberate plan, *as this is not the only reasonable inference that could be drawn from this fact*.[275]

158. The majority thus simply disagrees with the Prosecution's conclusion, positing that an alternative 'reasonably possible' interpretation may exist—even though it is not directly grounded in the facts as they have reasonably been understood by the Prosecution. In other words, the majority's approach appears to impose a burden upon the Prosecution to conduct an investigation unless it can eliminate all reasonably possible *speculations* about the apparent facts which might satisfy the article 53(1) test, rather than a more orthodox approach in which the Prosecution positively has to identify information supporting its conclusions at the appropriate standard of proof. Such an approach leads to potentially untenable consequences—if investigation is only precluded when the circumstances are such that the available information excludes even speculation that the gravity threshold might be met, then in effect all preliminary examinations will result in investigation. This is inconsistent

[274] Request, para. 43.
[275] Request, para. 43 (emphasis added).

with the object and purpose of the Statute, and the particular scheme laid out in article 53, and cannot be correct.

159. For these reasons, the Prosecution considers that nothing requires or justifies departing from the conclusions in the Report concerning the focus of the identified crimes aboard the *Mavi Marmara*. In all the circumstances, the Prosecution reaffirms its view that this tends to militate against the view that the identified crimes were committed according to a plan or policy.

II. 6. Considerations related to the nature of the identified crimes

160. In the Report, the Prosecution concluded that the alleged mistreatment of the passengers aboard the *Mavi Marmara*—which included allegations of the extended use of restraints, beatings, limited access to toilet facilities and medication, exposure for several hours to sun and wind, physical and verbal harassment, and hooding[276]—did not on the information available appear to "amount to infliction of 'severe' pain or suffering so as to fall within the intended scope of inhuman treatment under article 8(2)(a)(ii)."[277] The Prosecution determined, however, that these acts if proven *would* nevertheless be punishable as outrages upon personal dignity under article 8(2)(b)(xxi).[278]

161. The majority, in the Request, disagreed with the Prosecution's assessment, which it considered could not be "credibly attempted" in a preliminary examination. It reasoned therefore that "the correct conclusion would have been to recognise that there is a reasonable basis to believe" the severity threshold for inhuman treatment

[276] Report, para. 64.
[277] Report, para. 69. The Prosecution further noted, as an indication of the applicable threshold of severity indicated by the case law, that "inhumane treatment has been held to include use of persons as human shields and imprisoning civilians with their hands tied for many hours in a classroom filled with dead bodies": Report, para. 69, fn. 133. *See further* Prosecution Response to Comoros, paras. 101-102.
[278] Report, paras. 69-72.

was met, "and to take this into account for the assessment of the nature of the crimes as part of the gravity test."[279]

162. As previously recalled, the Prosecution doubts that, at the preliminary examination stage, it can determine a reasonable basis to proceed with investigating a specific identified crime *without* a reasonable basis to believe all the requisite elements of that crime are established.[280] Yet in any event the recommendation in the Request cannot be followed because, as the Prosecution made clear during litigation before the Pre-Trial Chamber, it gave only "neutral significance" to the *legal characterisation* of the alleged mistreatment in its gravity assessment.[281] Rather, it was the *factual* nature of the identified conduct—which was ultimately undisputed in the Request—which was relevant to the gravity analysis in the Report.[282]

163. The Prosecution recalls that the Comoros and the legal representatives of the victims had nonetheless also taken issue with the Prosecution's factual assessment in the Report. They stated that there is "credible evidence of torture, cruel and inhuman treatment, which the Prosecutor has completely ignored".[283] This is incorrect, for the following reasons:

- The Comoros and the victims represented by OPCV referred to the assessment of the UN Human Rights Council that the mistreatment was "cruel and inhuman in nature".[284] However, the assessment of a third party cannot replace the Prosecution's own obligations under the Statute. Article 53(1) requires that *the Prosecution* is satisfied that the requisite criteria for initiating

[279] Request, para. 30.
[280] *See above e.g.* paras. 17, 22, 24, 30, 54.
[281] *See above* para. 83.
[282] *See above* paras. 83-87.
[283] Request for Review, para. 95. *See also* Victims' Observations (Independent Counsel), para. 41 (suggesting that accounts of certain victims "could not have been examined by the Prosecutor").
[284] Request for Review, para. 95 (quoting UNHRC Report, para. 176); Victims' Observations (OPCV), paras. 59-61, 130.

an investigation are met, based on its own appreciation of the law and facts, applying the appropriate standard of proof.[285]

- The Comoros suggested that the Prosecution should have inferred that the IDF planners of the boarding operation desired "to imprison by humiliating means a very large body of people whose intellectual approach to the Gaza conflict differed from that of the Government of Israel and who needed to be dissuaded by force and humiliation from ever repeating what was done."[286] The only suggested basis for this inference was that the "IDF went equipped with sufficient plastic handcuffs for the hundreds of people on board of the vessels".[287] In the circumstances, however, the Prosecution did not consider that this fact alone was a reasonable basis for the inference suggested. Contemplating the use of restraints, even of a large number of people, is different from contemplating the *misuse* of restraints, which was the conduct pertinent to the identified crime. The Comoros' reference to this fact—which was known to the Prosecution in producing the original Report—does not in any event show that the assessment in the Report was *unreasonable*, such that it must now be reconsidered.

- The Comoros and the victims represented by independent Counsel stated that the Prosecution failed to refer to certain evidence in the Report.[288] However, of the 23 personal accounts cited, 14 were not in the Prosecution's possession at the time the Report was published, and one of the persons concerned was not a passenger aboard the *Mavi Marmara*.[289] Of the eight persons for which the

[285] *See also* Prosecution Response to Victims, para. 27.
[286] Request for Review, para. 96. *See also* Victims' Observations (Independent Counsel), para. 46 (advancing a similar argument based not only on the use of restraints, but also the presence of "lists of passengers, and dogs", and more generally the "well-planned" nature of the operation).
[287] Request for Review, para. 96.
[288] Request for Review, paras. 97-98; Victims' Observations (Independent Counsel), paras. 41-42. *See also* Victims' Observations (OPCV), paras. 67-68.
[289] The significance of the information subsequently made available is addressed below. *See below* paras. 188-203, 287-303.

Prosecution did have some form of statement, their accounts are consistent with the mistreatment identified but do not show that the Prosecution was unreasonable to conclude that the severity requirement of inhuman treatment was not met. Nor was the Prosecution obliged in the Report to refer to each and every piece of information that it took into consideration.[290]

- The Comoros and the victims represented by independent Counsel alleged that there is evidence of "abuse having a sexual character".[291] However, although the Prosecution did have in its possession (at the time the Report was published) statements from two of the three persons cited, neither of these statements contained the allegation to which the Comoros and the legal representatives of the victims refer.[292]

- The victims represented by independent Counsel similarly alleged that there is evidence of the desecration of the dead.[293] Again, however, the Prosecution only had in its possession (at the time the Report was published) a statement from one of the two persons cited, and this statement did not contain the allegation to which the legal representatives of the victims referred.[294]

164. Additionally, the victims represented by OPCV argued that the Prosecution had erred in the application of its policy expressed in the *Policy Paper on Preliminary Examinations*. Specifically, they argued that the gravity analysis in the Report was "too strict" in circumstances "where the Prosecutor concedes that two grave breaches of the Geneva Conventions may have been committed", and thus "inconsistent with the flexible interpretation required by the principle of

[290] *See further* Prosecution Response to Comoros, para. 20; Prosecution Response to Victims, paras. 45, 59, 63.
[291] Request for Review, para. 99; Victims' Observations (Independent Counsel), paras. 44-45.
[292] *See also* Prosecution Response to Victims, para. 152, fn. 382. Information subsequently made available is addressed below. *See below* paras. 297-298.
[293] Victims' Observations (Independent Counsel), para. 43.
[294] *See* Prosecution Response to Victims, para. 155, fn. 389. *See also below* paras. 300-303.

effectiveness."[295] This reasoning, however, is inconsistent with the principle that there is no hierarchy of crimes in the Statute.[296] Likewise, although the Prosecution agrees that "very poor conditions of detention" and similar treatment *can* reach the severity threshold for inhuman treatment,[297] this does not show that it was unreasonable for the Prosecution to determine, on the information available, that they did not reasonably appear to do so in this situation.

165. For these reasons, the Prosecution considers that nothing requires or justifies departing from the conclusions in the Report concerning the factual nature of the identified crimes aboard the *Mavi Marmara*, relevant to its assessment whether any potential case arising from the situation would be of sufficient gravity to be admissible before this Court.

II. 7. Considerations related to the possible perpetrators of the identified crimes

166. One factor relevant to the gravity assessment is "whether the individuals or groups of persons that are likely to be the object of an investigation[] include those who may bear the greatest responsibility for the alleged crimes committed".[298] The Report did not expressly state a conclusion on this question. However, as previously noted,[299] this did not mean that the Prosecution failed to take into account the possible perpetrators of the identified crimes. To the contrary:

> [T]he Report shows that the Prosecution expressly considered key indicators in this regard in its gravity analysis—notably, that the available information did not suggest that the Identified Crimes were systematic or resulted from a deliberate plan or policy, having regard especially to the commission of the Identified Crimes on just one of the seven vessels of the flotilla and the manner in which those crimes were committed. These factors suggested that the potential perpetrators of the Identified Crimes were among those who

[295] Victims' Observations (OPCV), para. 129.
[296] *See above* paras. 83, 86 (fn. 148).
[297] Victims' Observations (OPCV), para. 65.
[298] Report, para. 135.
[299] *See above* para. 94.

> carried out the boarding of the *Mavi Marmara*, and subsequent operations aboard, but not necessarily other persons further up the chain of command.[300]

167. In this context, it is plain that the individuals or groups which might be the object of an investigation of the identified crimes could at least include any direct physical perpetrators.[301] This factor alone, however, did not outweigh the other factors considered in the gravity analysis in the Report, nor does it show that the conclusion ultimately reached—that no potential case(s) arising from the situation were of sufficient gravity to be admissible—was unreasonable.[302]

168. The Comoros argued before the Pre-Trial Chamber that, "senior IDF commanders and Israeli leaders could be investigated for planning, directing and overseeing the attack on the Flotilla",[303] and that this favoured the conclusion that the potential case(s) arising from the situation were sufficiently grave.[304]

169. The Prosecution does not agree that the information available at the time of the Report provides a reasonable basis to draw this conclusion.[305] It maintains its view that the involvement of senior members of the IDF and Israeli government in "other related operations to enforce the blockade" is immaterial, especially when the specific events aboard the *Mavi Marmara* appeared to be unique among blockade operations in the violence employed and the harm caused. Nor do the comments attributed by the Comoros to senior IDF commanders and Israeli leaders establish a reasonable basis to believe that they were involved in the identified crimes. Given the violence which ensured, the admission that "mistakes" may have been made in the boarding operation does not amount to admission of complicity. None of this information demonstrates that the Prosecution was unreasonable in its assessment of the possible perpetrators of the identified crimes.

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[300] Prosecution Response to Comoros, para. 60.
[301] *See also* Request, para. 24.
[302] *See also* Policy Paper on Preliminary Examinations, para. 60.
[303] Request for Review, para. 86.
[304] Request for Review, para. 88.
[305] Information subsequently made available is addressed below. *See below* paras. 328-331.

170. For these reasons, the Prosecution considers that nothing requires or justifies departing from the conclusions in the Report concerning the possible perpetrators of the identified crimes aboard the *Mavi Marmara*.

III. No new facts or information have become available since publication of the Report warranting reconsideration of the Prosecution's determination not to open an investigation

171. The preceding sections have detailed why the Prosecution cannot follow the reasoning of the Request in conducting its reconsideration, and why in any event nothing in the Parties' and participants' arguments before the Pre-Trial Chamber requires or justifies reconsideration of the reasoning or conclusions of the Report, based on the information available to the Prosecution up to 6 November 2014. Accordingly, the Prosecution's obligations under article 53(3)(a) and rule 108(3), concerning the Request, are discharged.

172. However, mindful of the Prosecution's residual discretion under article 53(4) of the Statute—to consider whether new facts or new information make it appropriate to reconsider a prior determination under article 53(1)—the Prosecution has further considered the information newly made available since 6 November 2014. In addition to substantive written observations from the Comoros and/or the legal representatives of the participating victims,[306] the Prosecution received more than 5,000 pages of information (some of it duplicating previously available information),[307] including:

- personal accounts, including by many of the participating victims, so that the Prosecution has access to information from more than 300 passengers aboard the *Mavi Marmara*, as well as passengers on other vessels;

[306] These were received on three occasions: 28 January 2016, 31 March 2016, and 31 August 2016. *See further* Annex E.
[307] *See further* Annex E, Annex F.

- personal observations by some participating victims "in response" to the findings of the Report;

- an opinion by a retired military officer;

- an opinion by a forensic pathologist;

- copies of forensic reports prepared by the Turkish authorities (of which some were, in whole or in part, already in the Prosecution's possession), as well as various photographs; and

- compilations of quotations, extracts, and other illustrative material prepared by counsel in support of their written observations.

173. This material has been reviewed and analysed, together with all the information previously available, by Prosecution staff familiar with the Report and the litigation before the Pre-Trial Chamber. These staff members included both personnel who had previously conducted the analysis leading to the Report and personnel who reviewed this information afresh.

174. In its letter of 28 January 2016, the Comoros stated that:

> Given that your office is now engaged in a fresh assessment of whether to open an investigation, all available evidence […] can be taken into account for the purposes of whether to conduct further inquiries […] as part of an investigation.

175. While not incorrect, this assertion does not make clear that the legal basis for an article 53(3)(a) review is different from the legal basis for the Prosecution to consider new information after an article 53(1) decision has been made.

176. The Prosecution recalls that, in determining whether and, potentially, how to "reconsider" a prior decision, in the meaning of article 53(3)(a) and rule 108(2), the Prosecution will analyse the reasoning of that prior decision based on the context of the *information available at the time the prior decision was taken*.[308] As such, for the strict purpose of article 53(3)(a) and rule 108(2), the Prosecution is obliged neither to receive or to inquire into additional information which may have come to light since the original article 53(1) decision was taken.

177. Instead, new information received by the Prosecution *after* an article 53(1) decision is governed by article 53(4).[309] This provision confers an absolute discretion upon the Prosecution: it "*may*, at any time, reconsider a decision whether to initiate an investigation […] based on new facts or information" (emphasis added). This discretion is wholly independent of the Pre-Trial Chamber's power to request the Prosecution to reconsider its decision under article 53(3)(a).

178. Accordingly, while the Prosecution has elected in this final decision to address the new information provided by the Comoros, this has been an exercise of its own independent discretion, in the interest of transparency. In the circumstances, it has not considered it necessary to interview any of the "new witnesses" in person, in accordance with rule 104(2).[310] As stressed before the Pre-Trial Chamber, the rule 104(2) procedure has no intrinsic procedural significance, and information provided orally in the context of a preliminary examination is entitled to no greater weight than the same information received in writing.[311]

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[308] *See e.g.* Prosecution Response to Victims, para. 129 ("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").
[309] *See also* Prosecution Response to Victims, para. 129 ("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)").
[310] *See* Letter of 28 January 2016; Letter of 31 March 2016.
[311] Prosecution Response to Comoros, para. 25.

III. 1. Analysis of information newly made available in personal accounts

179. The Prosecution has now received and reviewed a total of 324 accounts of persons aboard the *Mavi Marmara*, and 28 accounts of persons aboard vessels other than the *Mavi Marmara*.[312] The Prosecution has considered this information in the context of all the other information in its possession.

180. The Prosecution has individually analysed each of the personal accounts in its possession. To the extent some of these accounts may not be individually cited in this document, this does not mean that they have not been considered.

181. The personal accounts reflect a number of common themes, consistent with the findings in the Report. These are briefly summarised and addressed in the following pages.

182. As a preliminary matter, the Prosecution notes that many of the personal accounts appear to reflect some form of contact or link between their authors. In particular, the information available may lead to the conclusion that some persons who have sought to participate in these proceedings as victims have not only received some organised assistance in the practical arrangements to submit their applications, but also some forms of assistance related to the content or presentation of the accounts that they provide. In particular:

- 206 victim application forms make identical, or substantially similar,[313] allegations concerning the persons responsible for the events occurring aboard the *Mavi Marmara* (question 29 of the form);[314]

[312] *See* Annex F. More than 200 of these accounts are newly available to the Prosecution.
[313] These allege that the persons responsible for the events aboard the *Mavi Marmara* are the "State of Israel and Shimon PERES, Benjamin NETENYAHU, Ehud BARAK" and generally continue by listing some or all of the following persons in the same order: Avigdor LIEBERMAN, Gabi ASHKENAZI, Eliezer MERON, Amos YADLIN, etc.
[314] These include the applications for V1, V2, V4, V5, V6, V8, V9, V13, V14, V15, V17, V18, V19, V20, V21, V22, V23, V24, V27, V28, V31, V32, V33, V34, V35, V36, V37, V38, V39, V40, V41, V42, V43, V45, V48,

- 112 victim application forms make identical, or substantially similar,[315] requests for reparations for the events occurring aboard the *Mavi Marmara* (question 34 of the form);[316]

- 60 applicants and one other witness make at least one statement (either in their applications or in other accounts) which, by their use of particular expressions or distinctive allegations,[317] share at least one feature in common with other statements, which is unlikely to be coincidental;[318]

- 24 application forms not only lack the signature or mark of the applicant[319] but bear instead the stamp of the same law firm,[320] in which W13 (who is not an

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V50, V51, V52, V53, V54, V55, V56, V58, V63, V64, V65, V66, V68, V69, V71, V72, V73, V74, V77, V78, V80, V84, V86, V88, V91, V93, V94, V98, V101, V104, V106, V110, V111, V112, V115, V116, V117, V118, V119, V120, V121, V123, V128, V130, V132, V137, V138, V140, V143, V144, V146, V147, V148, V150, V153, V155, V157, V158, V159, V160, V162, V163, V166, V167, V168, V171, V172, V173, V174, V175, V178, V184, V185, V190, V192, V193, V195, V198, V199, V200, V201, V202, V203, V205, V206, V207, V211, V212, V213, V214, V219, V220, V222, V225, V226, V227, V228, V229, V231, V232, V233, V234, V236, V237, V238, V239, V240, V241, V242, V243, V247, V249, V250, V251, V252, V254, V255, V256, V257, V260, V263, V264, V267, V270, V272, V273, V274, V275, V277, V278, V279, V280, V282, V283, V285, V288, V290, V291, V294, V295, V296, V299, V303, V304, V305, V306, V307, V308, V309, V310 V311, V312, V313, V314, V316, V318, V319, V320, V322, V323, V325, V326, V327, V329, V330, V331, V332, V333, V337, V340, and V343.

[315] These requests stated the following in identical or very similar terms: "I would like: 1) an official, personal apology from the Israeli government; 2) compensation for all economic loss, including punitive damages; 3) charges filed and pursued against the perpetrators of this attack; and 4) the siege on Gaza to be lifted completely with full access to Gaza thorough its ports, borders and airspace for future aid convoys."

[316] These include the applications for V3, V7, V10, V11, V12, V24, V25, V28, V29, V42, V44, V46, V47, V49, V50, V52, V57, V60, V61, V62, V64, V65, V67, V69, V75, V79, V81, V82, V83, V90, V96, V99, V100, V104, V106, V107, V113, V120, V122, V125, V126, V127, V129, V131, V133, V135, V136, V137, V138, V139, V141, V145, V150, V151, V152, V153, V156, V164, V169, V177, V179, V183, V186, V187, V188, V194, V196, V197, V200, V201, V204, V205, V206, V208, V211, V215, V218, V224, V230, V233, V235, V239, V240, V241, V245, V246, V248, V249, V254, V262, V265, V266, V268, V272, V274, V276, V278, V284, V286, V287, V289, V293, V298, V301, V309, V317, V318, V324, V328, V335, V338, and V341.

[317] *See* Annex G.

[318] These include the applications for V14, V17, V18, V31, V35, V39, V41, V43, V54, V55, V57, V64, V72, V73, V77, V80, V93, V98, V112, V130, V140, V146, V147,V153, V157, V159, V160, V162, V165, V166, V171, V173, V174, V185, V220, V227, V229, V233, V333, V234, V243, V250, V256, V264, V282, V284, V288, V294, V295, V298, V299, V305, V308, V310, V311, V316, V318, V319, V322, and V329, and W4.

[319] A much greater number of applications (58) are simply unsigned, or omit the signature page: *see* Annex F.

[320] These include the applications for V25, V62, V75, V82, V96, V100, V107, V126, V127, V129, V133, V145, V156, V183, V204, V235, V245, V246, V248, V262, V286, V287, V317, and V337.

applicant) is a partner, and which has previously represented the Comoros in proceedings before this Court;[321]

- 2 applications contain accounts of the events aboard the *Mavi Marmara* which are, in their salient points, identical—although the applicants have similar names, the applications show distinct signatures and photographic identification;[322]

- 1 application is prefaced with a cover sheet created by an unidentified person or group, headed "Passenger Information Page", which not only clearly contemplates the proceedings at this Court (recording, for example, whether the applicant provided an "ICC power of attorney") but also other connected matters (recording whether the applicant testified in the "Turkish Court", and whether the applicant "agrees to PR involvement").[323]

183. Although it is clearly not wrongful for victims to seek or to receive assistance in preparing application forms, the Prosecution emphasises that the victim application form specifically asks:

- whether the victim is applying "on his/her own behalf" (questions 13-21);

- whether somebody is "assisting the victim to fill in this form" (questions 23-24); and

- whether "an interpreter" is "assisting with the filling in of this form" (question 25).

[321] The Prosecution further notes that W13 continued at least in 2015 to act on behalf of the Comoros and/or the victims represented by independent counsel, including in correspondence with V38. W13 has also acted in other legal proceedings associated with the events aboard the *Mavi Marmara*.
[322] These include the applications for V167 and V205.
[323] This is the application of V239.

184. The Prosecution notes that the vast majority of victim applications in its possession declare, contrary to the impression given by their content, that the applicant is applying *on their own behalf, without any assistance* other than that of an interpreter, where required.[324]

185. The Prosecution is mindful that victim applications are not sworn statements, and are neither intended nor used as such. However, as a matter of good practice, it underlines its view that *any organisation assisting persons to come into contact with the Court*—a practice which is welcomed and encouraged—*should ensure that the nature and extent of their role in assisting the applicant is made clear in the manner required*.

186. In light of these observations, in evaluating the victim applications together with the other information available, the Prosecution has taken into account that some allegations may have been discussed by the former passengers on the *Mavi Marmara*.[325] It also recalls that many accounts do not distinguish clearly between first-hand observations and information or rumours that have subsequently been heard. As described further below, the Prosecution reaffirms that the key allegations addressed in the Report are consistently supported by the victim applications and other personal accounts. On the other hand, certain allegations which were not supported by the information previously available—and thus were not established in the Report—still appear to be commonly accepted as true by a certain number of victims. The Prosecution has examined these allegations closely but determined, for the reasons set out below, that its original conclusions are not shown to be

[324] A small number of applicants (for example, V11, V141, V188, and V298) apparently checked the box to say they were *not* applying on their own behalf—but then still failed to answer questions 14-21 (identifying who was applying on their behalf). The applications also bear personal signatures, and are generally also supported by the applicant's own ID documentation. The Prosecution therefore considers the implication that another person was applying on these applicants' behalf to have been made in error.

[325] On the different circumstances in which similarities between statements may support or undermine the reliability of a statement, *see* Annex G.

unreasonable by the newly available information and therefore should not be altered.[326]

187. Before turning to the specific submissions made by the Comoros based on the new information provided to the Prosecution, some key themes of the personal accounts reviewed—which are largely consistent with the information already in the Prosecution's possession—are briefly recalled. These include the use of restraints by the IDF after the *Mavi Marmara* was secured, alleged violence against detained persons aboard the *Mavi Marmara*, the adverse physical circumstances of detained persons aboard the *Mavi Marmara*, the processing of detainees on Israeli territory (at Ashdod), the conditions of detention on Israeli territory, and the alleged loss of detainees' property.

III.1.a. Use of restraints by the IDF after the Mavi Marmara *was secured*

188. In its Report, the Prosecution determined that there was a reasonable basis to believe "many"[327] persons detained aboard the *Mavi Marmara* were subject to outrages upon personal dignity, in the meaning of article 8(2)(b)(xxi), based *inter alia* on "overly tight handcuffing for extended periods (in some instances causing swelling, discoloration, and numbing […])", "being forced to remain kneeling on the decks", and "being blindfolded or having hoods put over their heads."[328]

189. The new information provided to the Prosecution, considered in the context of the information previously available, is entirely consistent with this determination. Thus:

- At least 260 persons report that they or others were restrained with plastic cable ties, usually tied tightly, for some or all of the *Mavi Marmara*'s voyage to

[326] *See below e.g.* paras. 197-199 (alleged execution of detainees), 200 (alleged threats to infant child), 252-258 (alleged attempt to assassinate particular passenger), 287-291 (alleged deliberate denial of medical treatment).
[327] *See above* paras. 76, 127-129.
[328] Report, para. 64. *See also* paras. 69, 71-72.

Ashdod.[329] Some of the wounded were among those restrained. While detained on the upper decks, for the first part of the voyage, most of the men were required to kneel with their hands tied, many behind their backs. After some hours, when the passengers were allowed to return below decks, most passengers (both women and men) were allowed to sit, albeit in cramped conditions. Although some soldiers refused to loosen or to adjust the detainees' restraints, at least 29 persons acknowledge that their restraints, or the restraints of others, were at some point loosened, swapped to allow their hands to be bound at their front, or removed.[330]

- At least 9 persons report that they, or others, were hooded or blindfolded while they were restrained on the *Mavi Marmara*.[331]

190. The Prosecution has, moreover, considered the accounts emphasised by the Comoros in its letter to the Prosecution of 31 August 2016 alleging that detained persons were subject to "prolonged and painful stress positions and ill-treatment.[332] Although the majority of these particular accounts were not made available to the Prosecution until that time,[333] the other information available made similar reference

[329] These include V1, V2, V3, V4, V5, V6, V8, V9, V11, V12, V14, V15, V17, V19, V20, V22, V23, V24, V26, V29, V31, V32, V33, V35, V36, V37, V38, V39, V40, V41, V43, V44, V45, V46, V47, V48, V49, V50, V52, V53, V54, V55, V56, V57, V59, V61,V63, V64, V65, V67, V69, V72, V73, V74, V77, V78, V79, V80, V82, V83, V84, V88, V89, V90, V91, V92, V93, V94, V98, V99, V104, V106, V109, V110, V111, V112, V113, V116, V117, V118, V119, V120, V121, V122, V123, V125, V126, V127, V128, V130, V131, V132, V133, V136, V138, V139, V140, V141, V143, V144, V145, V146, V147, V150, V151, V153, V154, V155, V157, V159, V160, V162, V164, V165, V166, V167, V168, V169, V171, V172, V173, V177, V179, V183, V185, V186, V187, V190, V192, V193, V194, V195, V197, V198, V199, V200, V202, V203, V208, V211, V213, V214, V215, V217, V218, V219, V220, V221, V222, V224, V225, V226, V229, V230, V232, V233, V234, V236, V237, V238, V239, V240, V241, V242, V243, V244, V245, V249, V250, V252, V254, V255, V256, V257, V260, V263, V264, V265, V266, V267, V270, V273, V274, V275,V276, V278, V279, V280, V282, V283, V284, V285, V286, V288, V289, V291, V293, V294, V295, V296, V298, V299, V301, V303, V304, V305, V306, V307, V308, V310, V311, V313, V314, V316, V317, V318, V319, V320, V321, V322, V324, V325, V326, V327, V328, V329, V330, V332, V333, V335, V337, V338, V340, V341, V342, V343, W1, W2, W3, W4, W5, W6, W7, W8, W9, W12, W13, W15, W16, W17, W18, W19, W20, W23, W24, W25, W26, W27, and W28.

[330] These include V36, V43, V49, V53, V91, V98, V99, V109, V116, V119, V127, V132, V136, V138, V141, V153, V165, V193, V213, V236, V245, V274, V278, V299, V341, W1, W3, W5, and W9.

[331] These include V20, V38, V44, V109, V136, V222, V241, V247, and W5.

[332] *See* First Letter of 31 August 2016.

[333] *See* First Letter of 31 August 2016 (referring to V3, V11, V49, V57, V99, V113, V122, V127, V131, V133, V141, V145, V161, V164, V169, V177, V179, V183, V186, V197, V218, V230, V266, V324, V328, and V338).

to the physical circumstances of the passengers as they were restrained. As such, the Comoros does not identify any allegation in this respect which did not form part of the Prosecution's previous analysis in the Report.

191. Accordingly, although the Prosecution regards with concern the available information concerning the circumstances in which the detainees were restrained, it simply reaffirms the view already taken in the Report. None of the information available, including the newly provided information, requires the Prosecution to exercise its discretion to reconsider its determination under article 53(4) of the Statute.

III.1.b. Alleged violence against detained persons on the Mavi Marmara

192. In its Report, the Prosecution determined that there was a reasonable basis to believe "many"[334] persons detained aboard the *Mavi Marmara* were subject to outrages upon personal dignity, in the meaning of article 8(2)(b)(xxi), based *inter alia* on "being beaten" and subjection to various forms of "physical and verbal harassment such as pushing, shoving, kicking, and threats and intimidation (including from dogs which reportedly also bit a few passengers)".[335]

193. The new information provided to the Prosecution, considered in the context of the information previously available, is entirely consistent with this determination. Thus:

- At least 94 persons report that they witnessed or were subject to some form of physical assault by an IDF soldier against a detained person.[336]

Prior to 31 August 2016, the Prosecution had statements for just three of these persons (V57, V197, and V266) in its possession. The Prosecution still does not have in its possession any statement by V161.

[334] *See above* paras. 76, 127-129, 188.

[335] Report, para. 64. *See also* paras. 69, 71-72.

[336] These include V1, V6, V8, V9, V13, V15, V30, V31, V35, V38, V40, V44, V46, V50, V52, V53, V56, V57, V58, V59, V65, V72, V90, V92, V98, V99, V106, V113, V119, V120, V127, V128, V131, V132, V133, V137, V145, V151, V167, V168, V179, V183, V203, V218, V221, V222, V224, V226, V227, V230, V232, V238,

- At least 55 persons reported hearing verbal insults or threats uttered by IDF soldiers.[337]

- At least 51 persons referred to "pushing around" or rough treatment of detainees by IDF soldiers.[338]

- At least 42 persons referred to the use of military working dogs aboard the *Mavi Marmara*.[339] These accounts appear to describe at least three incidents in which detainees were bitten,[340] and the use of dogs otherwise to intimidate the detainees.[341]

194. The Prosecution has, moreover, considered the accounts emphasised by the Comoros in its letter to the Prosecution of 8 June 2016 alleging the use of violence

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V239, V240, V245, V249, V257, V262, V267, V268, V270, V273, V275, V276, V278, V279, V284, V285, V291, V294, V295, V304, V306, V311, V313, V314, V316, V321, V325, V327, V328, V335, V338, V342, V343, W1, W2, W9, W13, W18, W21, W24, W25, and W26. The Prosecution notes, however, that one of the two allegations described by V245—suggesting that V82 was beaten "half unconscious" so that his face was "deformed"—is not supported by V82's own account, which makes no reference to such an incident.

[337] These include V8, V14, V40, V41, V47, V50, V51, V55, V58, V65, V72, V90, V92, V109, V127, V129, V132, V133, V137, V143, V151, V153, V165, V192, V194, V197, V213, V220, V226, V227, V232, V239, V267, V270, V274, V275, V282, V284, V294, V295, V306, V316, V318, V319, V327, V328, V335, V342, W2, W6, W9, W13, W16, W17, and W23.

[338] These include V3, V4, V5, V11, V20, V29, V43, V50, V53, V69, V81, V82, V98, V106, V109, V112, V133, V136, V137, V141, V143, V145, V151, V152, V163, V165, V169, V177, V187, V192, V203, V219, V227, V236, V242, V267, V275, V285, V294, V295, V299, V306, V314, V321, V323, V342, W5, W8, W23, W25, and W26.

[339] These include V4, V5, V9, V28, V29, V31, V32, V34, V46, V48, V50, V82, V88, V98, V112, V131, V136, V148, V150, V151, V174, V197, V213, V240, V254, V255, V274, V282, V291, V299, V301, V303, V306, V311, V314, V316, V326, V327, V335, V342, W23, and W25.

[340] V4, V29, V32, V98, V112, V148, V311, V314, V327, V335, V342 and W25 all refer to a British/Cypriot man called "Mustafa", who had been assisting with "translation", and who was bitten by a dog in his stomach. (V29 further observes that "[t]he dog would have caused more damage if he were not stopped by the soldiers.") V9 refers to a man called "Ahmet" being bitten. V82 saw a dog attack a "female passenger", whom he knew "to be a Kuwaiti national, who had her arm in plaster". In addition, V31, V34, V46, V48, V131, V197, V303, and V316 each refer to a dog biting one person, but do not provide enough information to know whether these are the same or separate incidents. V282 refers to "a few people" who were attacked by dogs. V326 and W23 saw a muzzled dog, with what looked like blood on its snout.

[341] V28, V50, V88, V136, V213, V274, V299, and V306 say dogs were used to "intimidate" the passengers. V150, V151, V174, V240, V254, V255, V291 and V301 suggest dogs were "set" to "attack" them or others, but none reports an actual bite or injury. V5 saw an IDF soldier restrain a dog from attacking him.

against detainees aboard the *Mavi Marmara*.[342] These do not identify any allegation which did not form part of the Prosecution's analysis in the Report.

- Regarding the assault or physical mistreatment of detainees, the Comoros refers to many of the same accounts previously analysed.[343] The Prosecution agrees that the available information suggests, for example, at least that the assaults of V6,[344] V38,[345] and V279[346] were deliberate and spontaneous acts inconsistent with the reasonable use of force.[347]

- Regarding the assault or physical mistreatment of wounded detainees, the Comoros refers to many of the same accounts previously analysed.[348] The Prosecution again agrees that some of these allegations, such as that of V15,[349]

[342] *See* Letter of 8 June 2016 (citing accounts considered relevant to allegations, *inter alia*, that detained persons were "severely beaten and abused" or "humiliated", "beaten and mistreated while being forced to lie down and when handcuffed", assaulted when they were wounded, "attacked and bitten by dogs", and that persons attempting to assist wounded detainees were "shot at or beaten").
[343] *See* Letter of 8 June 2016 (referring to V6, V9, V30, V31, V35, V38, V40, V71, V115, V119, V120, V175, V167, and V279). *See above* fn. 336; *see also* fn. 338. The Prosecution finds the accounts of V71, V115, and V175 to be of marginal relevance in the particular context of this allegation. V115 refers generally in one statement to verbal and physical "abuse[]" aboard the *Mavi Marmara* but, in another statement, states that "[a]fter I was wounded the Israeli soldiers did not treat me in any harsh way". V71 and V175 were not passengers aboard the *Mavi Marmara* but aboard the *Defne* and the *Sfendoni*, respectively. The Court does not have jurisdiction over events aboard these vessels.
[344] V6 states that, after he was handcuffed, "the soldiers kicked me 30-40 times in my groin area and other parts of my body" while the barrel of a gun was held to his throat.
[345] V38 states that he was "sitting very calmly" on a bench when he was approached by Israeli soldiers who threw him to the deck, broke his glasses, restrained and hooded him, and then hit him more than once, including on the head. He was later diagnosed with a fractured rib, which he believes he sustained in this incident.
[346] V279 states that he "surrend[ere]d" to an IDF soldier who "started to hit[] and kick[] me in my back", and asked about "the blood on my clothing". The soldier did not believe that the blood came from "rescuing other victims" and then "he and another sol[di]er attacked me in a vicious way and I fell unconscious". When he awoke, he was handcuffed.
[347] The Prosecution further notes that other accounts—such as those of V40, V119, and V167—refer to blows delivered in the course of restraining or searching detainees. Although these incidents also constitute assaults, they do not suggest that the victim was singled out for particular mistreatment and thus may differ in their nature from incidents such as the apparent assaults of V6, V8, and V279. A third category of accounts—such as those of V30, V31, and V35—are unclear which type of assault they suggest may have occurred.
[348] *See* Letter of 8 June 2016 (referring to V5, V13, V15, V36, V52, V53, V56, V58, V59, V163, and V323). *See above* fns. 336-338. The Prosecution notes, however, that V13 is ambiguous whether V271 (for whom the Prosecution has not received any account) was assaulted before or after he was wounded. Likewise, V59 does not appear to allege any assault upon a wounded person.
[349] V15 states that he was beaten while bound and hooded, and asking for a doctor. Although it does not diminish the significance of the apparent assault, the Prosecution notes that V15's injuries do not appear to have been such, at least, to warrant medical evacuation. Likewise, V56 saw a "wounded man" apparently receive a blow for non-compliance with an instruction he did not understand but, from the apparent context of the incident, the man's wound may have been limited.

may be deliberate acts inconsistent with the reasonable use of force,[350] while noting that other allegations concern mistreatment or rough treatment in the course of actions which were nonetheless apparently directed to the medical treatment or evacuation of the persons concerned.[351]

- Regarding the use of military working dogs, the Comoros refers to the same accounts previously analysed.[352]

195. The Prosecution also notes information, however, suggesting that the use of violence against detainees, although significant, was nonetheless conducted on a relatively limited and discrete basis. For example, W28—a person of influence among the detainees with an active concern for their welfare—remarked "I didn't see the IDF beat up anyone. They are more clever than to beat someone in front of hundreds of people." Likewise, V278 stated her view that the conduct of the IDF could not "be called torture, but they made everything very uncomfortable for us"; "[i]t was very subtle".

196. Accordingly, although the Prosecution regards with great concern the available information suggesting the use of violence against detained passengers, nothing in this information, new or old, alters the view taken in the Report (which recognised, relevantly, a reasonable basis to believe that such crimes were committed). None of the information available, including the newly provided information, requires the Prosecution to exercise its discretion under article 53(4) of the Statute to depart from its prior determination.

[350] The Prosecution further notes that other accounts—such as V36—refer to a potentially excessive degree of force in initially restraining a passenger, who then promptly received medical attention once restrained.
[351] For example, V5, V52, V163, and V323 report mistreatment or blows in the course of moving them around the *Mavi Marmara*, or preparing them for evacuation by helicopter. The Prosecution also notes that V323 acknowledges he only "vaguely remember[s]", and is unsure whether he lost consciousness due to his wounds. *See further below* paras. 287-291. Likewise, V53 refers to the "barbaric[]" way in which his dressing was changed.
[352] *See* Letter of 8 June 2016 (referring to V4, V9, V31, V32, V48, V98, and V111). *See above* fns. 339-340. The Prosecution notes that the single statement of V111 in its possession makes no reference to the use of dogs.

197. In addition, the Prosecution notes that the new information contains two additional types of allegation of physical misconduct against detainees (executions of detainees after the *Mavi Marmara* was secured by the IDF, and threats to an infant child). However, for the following reasons, nothing in these additional allegations requires the Prosecution to exercise its discretion to reconsider the conclusions in the Report, according to article 53(4).

198. First, six persons appear to allege that the IDF executed detained persons after it had secured control over the *Mavi Marmara*.[353]

- V92 drew this conclusion from what he saw of the bodies of some of the deceased persons, and hearing gunshots "continue[] around the ship for some time", after he believed the *Mavi Marmara* to have been secured.[354] He mentioned this in just one of his two statements.

- V213 also drew this conclusion from what he saw of the bodies of some of the deceased persons.[355] He mentioned this in just one of his two statements.

- V225 alleges that "[a]round 50 of our friends were shot after they surrendered and their conditions were very grave", and names "Furkan DOGAN" and "Fahri YILDIZ" (two of the deceased victims) as among those who were "executed later on".

- V226 alleges that IDF soldiers "actually shot dead a few injured passengers".

[353] These include V92, V213, V225, V226, V306, and V321.
[354] V92 states: "All the corpses had bullet wounds in the side or back of their heads. Some of them appeared to have been executed after being wounded. Because, firstly, there were at least 5 to 9 bullet holes in the upper parts of their bodies. Secondly, following the Israeli takeover of the ship, gunshots continued around the ship for some time, despite the fact that we were all inside. I think they executed some wounded during this cleansing (!) [sic] operation."
[355] V213 states: "Two of these bodies had bullets in the side or back of their heads, as well as other wounds. These two men appeared to me to have been executed after being wounded."

- V306, a doctor, heard "individual gunshots coming from the upper floors" after the "intense attacks ended and everyone convened in the halls"; he "learned that these shots were directed at the injured who had been left upstairs and who were being executed one at a time". He supports this view from his later discovery at the harbour "that the number of dead was actually twice […] what we had expected".

- V321 alleges that Furkan DOGAN was shot "again and again when he was injured". He bases this view on his belief that "4 bullets were found in his skull".

199. This information, in the context of all the other available information, does not establish a reasonable basis to believe that any persons *in addition to* the 10 deceased persons were killed unlawfully, nor indeed are many of the specific allegations or implications about the nature of these alleged killings themselves reasonable. In particular:

- Given the information described in Annex D, there is no reasonable basis to believe that any of the nine passengers who died aboard the *Mavi Marmara* were still alive and in the IDF's custody—and thus in a position to be "executed"—by the time the ship was secured and the other passengers detained below deck.

- V92 and V213 appear to be broadly correct in their observations but, as demonstrated by the events described in Annex D, the location of these wounds is consistent with a range of possible circumstances, and does not lead especially to the conclusion that victims were executed once detained. The same applies to V321, although he is partially mistaken about the facts he reports.

- V225 and V226 do not explain the circumstances in which they allegedly observed soldiers executing the wounded. The Prosecution stresses, however, that the available information does suggest a reasonable basis to believe that some persons may have been unlawfully killed when they were wounded, as described in Annex D, but before the *Mavi Marmara* was secured and order restored. To the extent V225 and V226 imply such executions occurring after the *Mavi Marmara* was secured, this is inconsistent with the available information—including V225's and V226's own situations at this time.

- V306's surprise at the number of dead is consistent with the available information suggesting that not all of the deceased persons were taken below decks by the passengers. Accordingly, V306 would not have had the opportunity to see them.

200. Second, five persons allege that IDF soldiers threatened the baby child of the chief engineer of the *Mavi Marmara*, to compel the chief engineer to cooperate in bringing the vessel to port.[356] Having reviewed the accounts of this incident—including persons directly involved, as well as others in the vicinity—the available information does not provide a reasonable basis to believe the relevant remarks were uttered with criminal intent.

III.1.c. Adverse physical circumstances of detained persons on the Mavi Marmara

201. In its Report, the Prosecution determined that there was a reasonable basis to believe "many"[357] persons detained aboard the *Mavi Marmara* were subject to outrages upon personal dignity, in the meaning of article 8(2)(b)(xxi), based *inter alia* on:

[356] These include V50, V82, V197, V265, and W19. *See also* V145.
[357] *See above* paras. 76, 127-129, 188, 192.

> […] being denied access to toilet facilities and medication (such as for diabetes, asthma, and heart conditions); being given only limited access to food and drink; […] expos[ure] to the sun (reportedly resulting in 13 passengers receiving first-degree burns) as well as continuous seawater spray and wind gusts from helicopters hovering nearby, for a period of several hours […].[358]

202. The new information provided to the Prosecution, considered in the context of the information previously available, is entirely consistent with this determination. Thus:

- At least 157 persons referred to the limited access to toilets on the *Mavi Marmara* throughout the voyage to Ashdod, and the role of IDF personnel in determining if and when detainees would be permitted to use a toilet.[359]

- At least 114 persons referred to the wind, water and noise of IDF helicopters hovering close overhead while they were held on the top decks;[360] at least some of the helicopter activity, however, was associated with the conduct of medical evacuations from the *Mavi Marmara*.[361]

[358] Report, para. 64. *See also* paras. 69, 71-72.
[359] These include V3, V4, V11, V14, V17, V21, V24, V26, V29, V31, V33, V37, V38, V40, V41, V43, V45, V46, V47, V48, V49, V50, V54, V55, V57, V59, V61, V64, V67, V72, V73, V79, V81, V84, V88, V94, V98, V99, V104, V106, V109, V110, V112, V119, V120, V122, V123, V127, V130, V131, V133, V136, V138, V139, V140, V141, V144, V145, V147, V148, V150, V153, V154, V160, V162, V164, V165, V169, V172, V173, V179, V183, V185, V187, V190, V194, V199, V200, V202, V213, V214, V215, V217, V218, V220, V222, V226, V229, V230, V232, V233, V234, V236, V239, V240, V241, V242, V244, V245, V256, V257, V260, V262, V265, V266, V267, V273, V274, V275, V278, V282, V284, V285, V286, V288, V291, V294, V295, V299, V301, V303, V304, V306, V307, V313, V314, V316, V318, V319, V321, V322, V324, V328, V329, V332, V333, V335, V338, V342, W1, W2, W3, W4, W5, W6, W7, W9, W12, W13, W15, W18, W21, W23, W25, W26, W27, and W28.
[360] These include V3, V5, V15, V17, V26, V29, V31, V41, V43, V44, V45, V50, V52, V55, V57, V59, V61, V67, V69, V72, V73, V81, V83, V84, V88, V90, V91, V94, V104, V110, V111, V113, V116, V119, V121, V122, V125, V127, V129, V131, V132, V133, V138, V141, V143, V147, V151, V153, V154, V167, V168, V169, V173, V174, V177, V179, V187, V194, V197, V198, V203, V208, V214, V217, V218, V220, V221, V222, V226, V230, V233, V236, V242, V265, V266, V267, V273, V274, V275, V276, V282, V284, V286, V289, V294, V295, V298, V299, V303, V304, V306, V310, V318, V321, V322, V324, V325, V327, V328, V330, V332, V337, V338, V341, W3, W4, W6, W8, W9, W13, W17, W19, and W23.
[361] *See above* para. 194 (fn. 351); *below* para. 289.

- At least 111 persons referred to the limited availability of food and drink on the *Mavi Marmara* throughout the voyage to Ashdod.[362]

- At least 51 persons stated that they were exposed to the sun while held for several hours on the top decks of the *Mavi Marmara* as the IDF searched the ship.[363]

- At least 11 persons stated that they were unable to access their personal medication while detained on the *Mavi Marmara*.[364] One passenger, however, expressly acknowledged that they were allowed to keep their personal medication.[365]

203. Accordingly, although the Prosecution regards this information with concern, it simply reaffirms the view taken in the Report. None of the information available in this respect, including the newly provided information, requires the Prosecution to exercise its discretion to reconsider its determination under article 53(4) of the Statute.

III.1.d. Processing of detainees on Israeli territory at Ashdod

204. As previously noted, during the litigation before the Pre-Trial Chamber, the Comoros drew the attention of the Prosecution to the allegations concerning the

[362] These include V3, V8, V11, V14, V17, V21, V23, V24, V26, V31, V37, V41, V48, V49, V50, V54, V55, V57, V59, V61, V64, V65, V67, V72, V73, V84, V88, V90, V98, V104, V109, V110, V112, V113, V119, V120, V127, V130, V136, V140, V141, V147, V148, V151, V154, V165, V173, V183, V185, V199, V200, V203, V211, V213, V217, V218, V220, V222, V226, V230, V232, V233, V234, V236, V239, V240, V241, V242, V245, V260, V262, V264, V265, V266, V267, V273, V275, V278, V280, V282, V284, V286, V290, V291, V295, V299, V301, V303, V304, V313, V317, V318, V322, V328, V332, V333, V342, V343, W3, W4, W5, W6, W7, W12, W13, W17, W18, W19, W23, W25, and W26. Limited availability does not, however, mean total absence, as indicated by the accounts of persons such as V4, V43, V203, and V278.
[363] These include V1, V2, V24, V32, V39, V40, V43, V50, V59, V81, V84, V112, V116, V117, V119, V120, V128, V131, V138, V151, V162, V165, V168, V171, V174, V186, V187, V197, V200, V203, V211, V217, V225, V226, V227, V232, V234, V236, V255, V265, V266, V267, V273, V299, V317, V332, W7, W13, W17, W23, and W28.
[364] These include V21, V24, V50, V104, V165, V226, V233, V267, V294, W5, and W23.
[365] This was V138 ("The first soldier told me I could not have my little bag with me. I explained it was my medicine. Another passenger, […], raised his hand and reinforced my claim that this was my medication. By chance, they let it through").

processing of detainees when they arrived at Ashdod port.[366] Since these allegations concerned Israeli territory, where the Court does not have jurisdiction in the context of this situation, these allegations did not receive express consideration in the Report. Nor were these allegations of such a nature that it was necessary to take them into account in assessing the gravity of the identified crimes aboard the *Mavi Marmara*.[367]

205. The Prosecution has reviewed in detail the information in its possession, including the information newly made available, concerning the processing of detainees from the *Mavi Marmara*, and the other vessels of the flotilla, when they arrived at Ashdod in the state of Israel.

206. For the reasons which follow, and having considered all the available information, nothing requires or justifies departing from the original conclusions in the Report, under article 53(4). In particular, although the available information now describes the treatment of detainees at Ashdod with greater specificity, it does not show that the Prosecution was unreasonable in its prior conclusion concerning the relevance of these allegations to its assessment of the gravity of the identified crimes aboard the *Mavi Marmara*.[368]

207. In particular, the Prosecution notes that at least 136 detainees (approximately 40% of the available individual accounts) have complained of the way in which they or others were treated in Ashdod.[369] 27 of these complaints were unexplained, and

[366] Request for Review, paras. 118-119. *See also* Victims' Observations (Independent Counsel), para. 46.
[367] *See e.g.* Report, para. 88, fn. 161. *See also* Prosecution Response to Comoros, paras. 53-55; Prosecution Response to Victims, paras. 80-83.
[368] *See above* paras. 94, 135-147.
[369] These include V1, V2, V3, V4, V5, V6, V8, V11, V14, V17, V18, V20, V21, V22, V24, V26, V27, V29, V31, V32, V38, V41, V43, V45, V46, V47, V49, V50, V54, V55, V56, V57, V59, V64, V67, V69, V72, V73, V77, V78, V80, V81, V83, V88, V93, V104, V109, V111, V116, V120, V121, V123, V127, V130, V131, V133, V139, V140, V143, V144, V145, V146, V147, V150, V151, V154, V157, V160, V162, V165, V167, V169, V171, V173, V174, V177, V179, V183, V185, V187, V196, V202, V208, V217, V226, V228, V230, V233, V234, V237, V243, V244, V245, V247, V250, V254, V255, V256, V266, V267, V273, V274, V286, V288, V293, V294, V295, V298, V299, V304, V306, V307, V310, V312, V316, V318, V319, V321, V322, V327, V328, V329, V331, V333, V341, V342, W2, W3, W4, W5, W9, W10, W13, W19, W22, W23, and W25.

identified no specific treatment of concern.[370] The remainder disclosed five types of allegation:

- At least 54 detainees considered that they or others were questioned by Israeli officials in a forceful, threatening, or coercive manner,[371] and at least 17 detainees stated that they signed pieces of documentation as a result of the manner in which they were questioned.[372]

- At least 40 detainees complained of the manner in which they were searched by Israeli officials at Ashdod.[373]

- At least 29 detainees otherwise considered that they or others were insulted or mocked at Ashdod, either by officials or onlookers.[374]

- At least 23 detainees stated that they or others were "pushed around" or assaulted by Israeli officials at Ashdod.[375]

[370] These include V5, V8, V17, V20, V22, V24, V26, V27, V32, V38, V45, V54, V56, V69, V120, V121, V123, V144, V146, V233, V237, V256, V273, V274, V307, V321, and V331.
[371] These include V4, V18, V20, V21, V26, V29, V41, V50, V55, V57, V64, V67, V72, V73, V77, V78, V80, V93, V109, V127, V131, V140, V147, V150, V154, V157, V160, V162, V165, V173, V185, V187, V226, V228, V243, V247, V250, V254, V288, V295, V299, V304, V310, V312, V318, V319, V322, V327, V329, V333, W4, W5, W19, and W22.
[372] These include V1, V11, V31, V57, V59, V77, V78, V80, V93, V111, V121, V140, V169, V177, V245, V255, and V299. *See also* V47 (who felt compelled to sign a document, but noted that he was "not subjected to[] much harassments or abuse, whether verbally or physically" in the tents at Ashdod). Seven of these individuals
[373] Of these, at least 22 persons stated in general terms that they felt humiliated or degraded by being searched down to their undergarments: V2, V11, V31, V57, V73, V77, V81, V93, V130, V131, V140, V157, V171, V183, V228, V244, V256, V306, V316, V333, V341, and W23; *see also* V135. At least 14 other persons make comments—such as stating that they were "totally violated", searched in an "indecent" or "invasive" way or, in two cases, that they were subject to a "cavity" search—which might reflect similar sentiments or might suggest more specifically that they were subject to intimate searches: V38, V64, V72, V88, V233, V234, V267, V274, V295, V299, V318, W4, W9, and W13. The Prosecution further notes, however, that some of these individuals—and especially V72, V233, V295, V299, and V318—use virtually identical terminology, and are among those individuals whose statements are identified as containing distinctive similarities: *see above* para. 182; Annex G. At least 3 persons complained that attempts were made to search them with insufficient privacy, but these were halted when they protested: V50, V274, and W23. At least 3 persons complained that searches actually were conducted improperly: V144 (unnecessarily lengthy), V226 (photographs taken in an "embarrassing situation"), and V274 (search conducted roughly).
[374] Concerning the conduct of Israeli officials, these include V3, V6, V11, V14, V46, V49, V67, V88, V131, V133, V150, V165, V167, V196, V202, V208, V217, V245, V266, V293, V306, V316, V321, V327, V328, V341, W2, W3, and W23. At least 10 additional persons reported the presence of a crowd of onlookers as they disembarked, by whom they felt mocked or disrespected: V29, V43, V104, V109, V111, V116, V143, V151, V187, and V328.

- At least 12 detainees made additional specific complaints, which appear to relate principally to their own experience.[376]

208. The Prosecution recalls the description in the Turkel Report concerning the treatment of detainees at Ashdod, and particularly the fashion in which personal searches were carried out and the use of physical force.[377] These are intrusive measures which are commonly regarded as unlawful, and potentially criminal, unless necessary, proportionate, and conducted according to law. The Prosecution notes that the available information may now suggest that personal searches and the use of physical force were somewhat more common than the Turkel Report found. On the other hand, the Prosecution also notes that the charged political and cultural context may, in some specific instances, have contributed to misunderstandings or disagreements concerning the nature and purpose of the procedures employed at Ashdod, and their legitimacy.

209. With the exception of the allegations of insults and physical assault, none of the allegations arising from the available information bears a direct similarity to the identified crimes aboard the *Mavi Marmara*. In considering the allegations of physical assault, moreover, the Prosecution also takes into account the information of 39 persons suggesting that they and others received medical checks on arrival at Ashdod, and were transferred to medical facilities as required.[378] The provision of

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[375] These include V3, V11, V49, V67, V116, V127, V131, V133, V143, V145, V177, V179, V208, V230, V250, V266, V267, V293, V294, V327, V342, W3, W10, and W23.

[376] These include six persons who report that their property went missing or was damaged at Ashdod (V43, V88, V111, V120, V196, and V267). Other individual complaints include: V18 (headscarf removed roughly; this incident may have been witnessed by V104, V143, V165, and W23), V58 (restraints deliberately tightened), V109 (insufficient privacy when using the toilet), V174 (suspicious drinking water), V286 (held in an exposed area for prolonged period, insufficient food), V306 (posed against their will for a photograph with soldiers).

[377] Turkel Report, para. 152. From the information available, the person whose search is described in the Turkel Report, who was concealing the mobile telephone, may have been V109. Notably, V109 is not one of the persons who has complained about the conduct of their search: *see above* fn. 373.

[378] These include V11, V21, V43, V44, V46, V59, V65, V79, V91, V99, V113, V127, V131, V133, V141, V143, V145, V159, V164, V167, V186, V187, V202, V208, V211, V213, V230, V242, V245, V266, V285, V306, V314, V316, V321, V324, V328, V330, and W23. The Prosecution notes, however, that ten other detainees report that they or others did not receive the medical care that they felt necessary: V83, V101, V139, V174, V226, W2, W5, W23, and W25.

medical care may militate against the view that there was any organised policy of physical mistreatment at Ashdod.

210. Furthermore, as the Prosecution stressed during the litigation before the Pre-Trial Chamber, none of the available information reasonably suggests any sufficiently proximate link between the personnel allegedly responsible for the treatment of the detainees at Ashdod and the personnel allegedly concerned in the identified crimes aboard the *Mavi Marmara*.[379] In this context, the Prosecution also notes the Turkel Report's conclusion that authority over the detainees was transferred at Ashdod "from the IDF forces" to, variously, the counter-terrorism unit of the Israeli Border Police and/or the civil power.[380]

211. For all these reasons, therefore, although the Prosecution makes no legal characterisation of the alleged treatment of detainees at Ashdod (which is outside the Court's jurisdiction), nothing in the factual nature of these allegations shows its prior conclusion concerning the gravity of the identified crimes aboard the *Mavi Marmara* to have been unreasonable.

III.1.e. Conditions of detention on Israeli territory

212. As previously noted, during the litigation before the Pre-Trial Chamber, the Comoros drew the attention of the Prosecution to the allegations concerning the conditions in which detainees were held (for approximately two days) while on Israeli territory. Since these allegations concerned Israeli territory, where the Court does not have jurisdiction in the context of this situation, these allegations did not receive express consideration in the Report. Nor were these allegations of such a

[379] Prosecution Response to Comoros, para. 88; Prosecution Response to Victims, para. 81.
[380] *See* Turkel Report, para. 152.

nature that it was necessary to take them into account in assessing the gravity of the identified crimes aboard the *Mavi Marmara*.[381]

213. The Prosecution has reviewed in detail the information in its possession, including the information newly made available, concerning the conditions in which detainees were held while on Israeli territory.

214. For the reasons which follow, and having considered all the available information, nothing requires or justifies departing from the original conclusions in the Report, under article 53(4). In particular, although the available information now describes the conditions of detention with greater specificity, it does not show that the Prosecution was unreasonable in its prior conclusion concerning the relevance of these allegations to its assessment of the gravity of the identified crimes aboard the *Mavi Marmara*.[382]

215. In particular, the Prosecution notes that at least 128 persons (just under 40% of the available individual accounts) made some criticism of the conditions in which they were detained in Israel.[383] 27 of these accounts were unexplained, and identified no specific treatment of concern.[384] By contrast, nine persons specifically stated that the conditions were "reasonable", that the Israeli authorities at least "pretended to behave well", or comments to similar effect.[385]

[381] *See above* fns. 366-367.
[382] *See above* paras. 94, 135-147.
[383] These include V6, V10, V11, V14, V17, V25, V26, V29, V31, V32, V33, V34, V35, V37, V40, V41, V44, V46, V47, V49, V51, V54, V55, V56, V57, V59, V64, V65, V67, V69, V72, V73, V75, V79, V83, V84, V88, V92, V93, V96, V98, V113, V118, V119, V121, V122, V130, V131, V135, V136, V139, V140, V144, V151, V153, V154, V159, V160, V162, V169, V173, V179, V183, V187, V196, V197, V203, V213, V218, V220, V221, V225, V226, V228, V229, V232, V234, V239, V241, V248, V251, V256, V264, V266, V275, V276, V277, V278, V282, V284, V286, V288, V289, V291, V293, V294, V298, V299, V301, V303, V305, V307, V310, V311, V313, V316, V317, V318, V319, V321, V325, V328, V329, V331, V332, V333, V335, V341, W2, W4, W5, W6, W8, W15, W18, W23, and W25.
[384] These include V14, V32, V34, V56, V84, V92, V118, V139, V144, V160, V162, V225, V226, V234, V251, V291, V293, V294, V319, V325, V329, V331, V341, W2, W5, W15, and W25.
[385] These include V3, V75, V81, V99, V127, V236, V245, V278, and V324.

216. The specific complaints concerning the conditions of detention disclosed six types of allegation:

- at least 71 persons said their sleep was disrupted while in prison, principally due to repeated noises made on or by the doors of the cells;[386]

- at least 45 persons complained of the food and drink available while in prison,[387] although at least 16 persons referred to the food and drink without complaint;[388]

- at least 32 persons stated that they were unable to contact their families,[389] although at least 14 persons did confirm that they received consular or legal access;[390]

- at least 15 persons stated that they had insufficient privacy, especially for personal ablutions;[391]

[386] These include V10, V14, V17, V29, V31, V33, V34, V35, V40, V41, V44, V47, V54, V55, V57, V59, V64, V65, V69, V72, V73, V79, V83, V92, V113, V119, V121, V130, V131, V136, V140, V141, V153, V154, V159, V162, V169, V173, V187, V213, V220, V225, V228, V229, V232, V239, V256, V264, V275, V276, V277, V282, V284, V286, V289, V291, V298, V299, V305, V310, V316, V317, V318, V328, V329, V332, V333, W4, W15, W18, and W25. *But see* V91 (who slept soundly).

[387] Specific complaints varied. 26 persons stated that they were denied food and drink for at least some period of their detention: V17, V26, V33, V35, V41, V51, V54, V57, V64, V75, V93, V96, V113, V122, V130, V140, V159, V169, V187, V284, V288, V307, V310, V316, V318, and V333. 12 other persons stated that the food and drink provided was insufficient in quantity: V25, V37, V67, V72, V79, V173, V183, V213, V225, V248, V266, and V299. 8 persons said that the food and drink provided was of poor quality: V11, V26, V79, V169, V226, V239, V277, and W8. Finally, 3 persons (V6, V169, and V321) suggested that the food and drink was poisoned, although 11 other persons recalled *fears or rumours* that the food and drink *might be* poisoned or not *halal*: V49, V98, V103, V113, V151, V177, V179, V194, V230, V321, and V332.

[388] These include V3, V29, V44, V59, V81, V91, V99, V109, V131, V151, V175, V177, V179, V236, V245, and V278.

[389] These include V31, V40, V47, V49, V55, V59, V64, V69, V72, V92, V130, V140, V151, V159, V173, V203, V218, V220, V229, V232, V234, V239, V266, V284, V293, V299, V307, V316, V318, V333, W4, and W6. According to V119, "[o]nly the Turks were allowed to make personal phone calls"; according to V151, however, only English-speakers were allowed to make personal phone calls. By contrast, some persons stated that they were able to contact their families, after some delay: V99, V109 and V278.

[390] These include V59, V67, V69, V109, V175, V203, V213, V239, V245, V266, V278, V289, W2, and W5. By contrast, some persons stated that they did not receive consular or legal access: V119 and V187; *see also* V338. *See further* Turkel Report, para. 153, fn. 163 (acknowledging that there "were certainly more than a few difficulties" in facilitating consular and legal access due to "the short period of the flotilla participants' stay in Israel, the large number of participants, and the fact that they were held in open cells and the 'Ella' prison staff had difficulty locating them").

- at least 20 persons said that they or others were subject to insulting, humiliating, or coercive treatment while in prison,[392] and at least 12 persons complained about the improper use of force;[393]

- at least 23 persons made individual complaints about aspects of the arrangements for their confinement, which were not commonly reported by other persons.[394]

217. The Prosecution recalls the description in the Turkel Report concerning the conditions of detention, and particularly the facilities which were said to have been made available and the extent of any use of force.[395]

218. The Prosecution stresses that, as a general principle, all detainees are entitled to equal treatment in compliance with domestic and international standards of detention. However, while allegations implying violations of this principle, if true, might potentially engage Israel's responsibility as a State to ensure adequate detention conditions, this does not necessarily mean that individual criminal responsibility might attach to *all* such allegations. Conversely, it is clear that some complaints could, in principle and if true, reflect criminal conduct punishable as

[391] These include V6, V11, V67, V88, V113, V151, V179, V187, V196, V218, V294, V317, W6, W18, and W25. *See also* V236. By contrast, one person (V169) said they had no access to a shower.
[392] These include 12 persons who said that they or others were insulted, humiliated, or bullied: V40, V51, V75, V92, V98, V139, V218, V239, V275, V293, V307, and W6. Five other persons said they were subject to a threatening or coercive questioning while in prison: V197, V221, V286, V301, and V303. Four persons complained of the manner in which they were searched: V46, V65, V241, and V307.
[393] These include V10, V11, V65, V135, V218, V241, V248, V276, V282, V311, V321, and V335. These accounts appear to relate to a relatively small number of discrete incidents, including one in which a number of detainees "resisted" or "protested" in response to the apparent exclusion of some detainees from transport to the airport. Concerning this incident, *see also* V164, V218, V324, and V328.
[394] In particular, eight people complained that they were required to help "clean" some part of the prison facilities, although not all of them complied with this instruction: V55, V81, V84, V278, V289, W6, W15, and W18. Eight persons said the facilities or effects made available to them were tainted with a noxious substance: V6, V26, V67, V213, V335, W6, W8, and W23; *see also* V3, V44. By contrast, five persons expressly acknowledged receiving "clean clothes, toothbrush, and soap" and, by implication, clean water: V91, V109, V203, V236, V278 (although a blanket "full of holes"); *see also* V127. Four persons said that they did not have access to adequate medical care: V196, V226, V284, and W5; *see also* V11. Three persons said they did not have free access to toilet facilities: V313, V317, and W6. Two persons (V313 and V317) said they were prohibited from prayer, but five other persons expressly acknowledged they were permitted to pray "when we protested": V3, V44, V113, V183, and V338. One person (V67) said they received gender inappropriate clothing. One person (V187) said they were still in personal restraints while detained, at least initially.
[395] Turkel Report, para. 153.

outrages upon personal dignity—in particular, deliberate and prolonged disruption of sleep; insulting, humiliating or coercive behaviour; any unlawful use of physical force.

219. With the exception of the allegations of insults and physical assault, none of the allegations arising from the available information bears a direct similarity to the identified crimes aboard the *Mavi Marmara*. The Prosecution notes that these allegations are relatively few, and appear to relate to a small number of specific incidents. The Prosecution notes more generally that a number of the complaints about the conditions of detention are contradicted by the accounts of other detainees, and that the accounts also show indications of other measures intended to promote the welfare of detainees, even if these were not uniformly administered.

220. Furthermore, as the Prosecution stressed during the litigation before the Pre-Trial Chamber, none of the available information reasonably suggests any sufficiently proximate link between the personnel responsible for the conditions of detention on Israeli territory and the personnel concerned in the identified crimes aboard the *Mavi Marmara*.[396]

221. For all these reasons, therefore, although the Prosecution makes no legal characterisation of the conditions of detention on Israeli territory (which is outside the Court's jurisdiction), nothing in the factual nature of these allegations shows its prior conclusion concerning the gravity of the identified crimes aboard the *Mavi Marmara* to have been unreasonable.

222. It is stressed, however, that the irrelevance of the specific allegations discussed here to the identified crimes aboard the *Mavi Marmara* does not, however, diminish the importance generally attributed by the Prosecution to ensuring adequate conditions of detention, in full accordance with the standards of domestic law,

[396] *See above* para. 210.

international human rights law and, where applicable, international humanitarian law.

III.1.f. Alleged violence against detained persons on Israeli territory at Ben-Gurion airport

223. As previously noted, during the litigation before the Pre-Trial Chamber, the Comoros drew the attention of the Prosecution to the allegations of physical assaults occurring on Israeli territory, at Ben-Gurion airport. Since these allegations concerned Israeli territory, where the Court does not have jurisdiction in the context of this situation, these allegations did not receive express consideration in the Report. Nor were these allegations of such a nature that it was necessary to take them into account in assessing the gravity of the identified crimes aboard the *Mavi Marmara*.[397]

224. The Prosecution has reviewed in detail the information in its possession, including the information newly made available, concerning the alleged physical assaults at Ben-Gurion airport.

225. For the reasons which follow, and having considered all the available information, nothing requires or justifies departing from the original conclusions in the Report, under article 53(4). In particular, although the available information now describes the alleged assaults with greater specificity, it does not show that the Prosecution was unreasonable in its prior conclusion concerning the relevance of these allegations to its assessment of the gravity of the identified crimes aboard the *Mavi Marmara*.[398]

[397] *See above* fns. 366-367.
[398] *See above* paras. 94, 135-147.

226. In particular, the Prosecution notes that at least 84 persons have expressly alleged that detainees were assaulted at Ben-Gurion airport.[399] Others have referred more generally to mistreatment at the airport, but without further explanation.[400]

227. The alleged assaults appear to relate to a relatively small number of incidents, although some of these affected multiple people. The available information further suggests that there was at least one escalating physical confrontation between the detainees and Israeli authorities,[401] and potentially up to three other incidents featuring smaller numbers of people.[402] In addition, 19 further accounts could describe these incidents, or other incidents affecting a maximum of one or two persons each.[403]

[399] These include V15, V17, V26, V29, V31, V33, V35, V40, V41, V43, V46, V48, V54, V57, V64, V67, V71, V72, V77, V83, V84, V92, V93, V98, V110, V112, V116, V119, V130, V138, V140, V143, V146, V147, V153, V165, V166, V174, V196, V197, V198, V204, V217, V220, V226, V229, V233, V236, V238, V240, V250, V254, V258, V264, V265, V267, V274, V275, V277, V284, V288, V294, V295, V299, V303, V304, V305, V308, V310, V312, V318, V321, V322, V331, V332, V333, W4, W8, W10, W13, W23, O7, O12, and O17.

[400] These include V9, V10, V56, V94, V118, V121, V125, V159, V185, V213, V219, V221, V228, V234, V239, V257, V263, V282, V286, V316, V322, V325, V329, W18, and W25.

[401] This incident appears to have been triggered by O17's dispute with the Israeli authorities concerning the State to which he would be deported, which resulted in the authorities attempting to detain him. A large number of a nearby group of detainees, numbering "around thirty", "rushed" to O17's defence and were then (in O17's words) "beaten badly". Participants and/or witnesses to this event appear to include: V31, V43, V46, V49, V116, V119, V258, V274, V277, W8, W13, O12, and O17. They may also include V26, V67, V99, V312, and W23. The Prosecution notes that O12, who was detained following this incident, claims that he was later also "beaten in the middle of the night in my cell".

[402] First, in what seems to be a separate incident, V226 alleges that he was taken aside at passport control by one Israeli official, and insulted and struck. He was then "jumped on" by around "10 others", and removed to a "freezing cold" place outside the airport where he was "interrogated", beaten, placed in a stress position, and given something to drink which made him "confused". He was then returned to the airport. V71, V72, V143, V274, and V294 report that they saw at least some part of the incident affecting V226, and in some cases were assaulted when they tried to intervene. Second, a number of persons describe an unspecified incident affecting "the Greeks" (which may or may not be the same either as the incident involving O17 or V226): these include V3, V98, V112, V127, V164, V196, V275, V312, V321, and V332. Third, V138 states that he was "hit with the end of a rifle" when he "tried to get […] back" his passport, which he believed "had been stolen". W10 refers to a similar incident, although he believes the victim was an "Italian" (which is not an obvious description of V138).

[403] These include V11 (reports that he was "beaten up violently and handcuffed" in an incident with "lots of shouting and pushing going on"), V29 (saw one person with "purplish marks on his face", having been temporarily separated from the line), V47 (saw one person assaulted), V84 (saw one person assaulted), V92 (reports, in one of his statements, that he was "hit" at the airport), V122 (saw one person assaulted), V138 (saw one person "dragged away"), V174 (saw two people assaulted by "5 to 6" Israeli officials), V133 (saw one person assaulted by "4 to 5" Israeli officials), V145 (saw one person assaulted), V147 (saw one person assaulted when V321 voluntarily went for interview), V177 (saw one person assaulted), V183 (saw one person assaulted by "around 10-15" Israeli officials), V187 (saw one person assaulted), V198 (saw one person assaulted by "4 to 5" Israeli officials), V224 ("remembers" that two people had broken arms), V230 (saw more than one passenger assaulted), V236 (saw one person assaulted by "5" Israeli officials), V250 (saw V11 assaulted)

228. The Prosecution recalls the description in the Turkel Report of (what it terms) a "riot" at the airport,[404] in which "about 40 flotilla participants […] began to clash with police forces in the passenger hall". It notes that "six of those who were disorderly required medical treatment" as a result of the confrontation with "approximately twenty police officers who used their hands and handcuffs" and, "in one instance", a "club".[405]

229. The Prosecution considers that these allegations, in their nature, bear some similarity with the identified crimes aboard the *Mavi Marmara*. However, unlike the *Mavi Marmara*, the available information does not suggest that "many" of the total number of detainees were potentially affected.

230. Furthermore, as the Prosecution stressed during the litigation before the Pre-Trial Chamber, none of the available information reasonably suggests any sufficiently proximate link between the personnel providing security at Ben-Gurion airport and the personnel concerned in the identified crimes aboard the *Mavi Marmara*.[406]

231. For all these reasons, therefore, although the Prosecution makes no legal characterisation of the alleged assaults at Ben-Gurion airport (which is outside the Court's jurisdiction), nothing in the factual nature of these allegations shows its prior conclusion concerning the gravity of the identified crimes aboard the *Mavi Marmara* to have been unreasonable.

III.1.g. Alleged appropriation of detainees' property aboard the Mavi Marmara

232. In its Report, the Prosecution previously concluded that "IDF soldiers may have unlawfully and wantonly appropriated the personal property and belongings of passengers", including "cash, personal electronics, jewellery, and clothing" as well as

[404] Turkel Report, para. 154, fn. 662.
[405] Turkel Report, para. 154.
[406] *See above* para. 210.

"magnetic media".[407] However, analysing this appropriation in the context of the offence in article 8(2)(a)(iv) (extensive destruction or appropriation of property)—as opposed to article 8(2)(b)(xvi) (pillage), which requires that the appropriation was made for personal gain—the Prosecution determined that there was no reasonable basis to believe an offence was committed.[408] In particular, the Prosecution could not be satisfied at that the property was "protected" for the purpose of article 8(2)(a)(iv)[409] or that it was appropriated on a sufficiently extensive scale.[410]

233. The Prosecution notes that neither the Comoros, the victims, or the Pre-Trial Chamber contended that the Prosecution's assessment was erroneous.

234. However, the Prosecution has now reviewed the new information provided, in the context of the information already in its possession. In particular:

- at least 237 detainees (primarily aboard the *Mavi Marmara* but also from other vessels) report the loss of personal or professional items, especially mobile telephone and electronic equipment;[411]

- at least 63 of these detainees also reported the loss of significant[412] sums of cash, totalling more than $430,000 in dollars, euros, and pounds sterling.[413]

[407] Report, para. 85.
[408] Report, para. 89.
[409] Report, para. 86. *See further e.g.* Dörmann, p. 82 (noting that article 8(2)(a)(iv) "concerns only property specifically protected by the GC, in particular medical property (such as units and establishments), property of aid societies and property in occupied territories, citing ICTY, *Kordić* TJ, para. 335 *et seq*).
[410] Report, para. 88. *See also* fn. 161.
[411] These include V2, V3, V4, V5, V6, V8, V9, V11, V15, V17, V18, V19, V20, V21, V22, V23, V24, V26, V27, V31, V32, V34, V35, V37, V38, V39, V42, V44, V45, V47, V48, V50, V51, V52, V54, V57, V59, V61, V62, V67, V69, V71, V73, V75, V77, V78, V79, V80, V81, V82, V83, V84, V86, V88, V90, V92, V93, V96, V98, V99, V103, V107, V109, V110, V111, V112, V113, V116, V117, V118, V120, V123, V125, V126, V128, V130, V131, V133, V135, V136, V137, V138, V140, V141, V143, V146, V147, V148, V150, V151, V152, V153, V155, V157, V158, V159, V160, V162, V163, V164, V165, V166, V167, V168, V169, V171, V172, V173, V174, V175, V177, V179, V183, V185, V187, V188, V192, V193, V194, V195, V196, V197, V198, V199, V200, V202, V203, V204, V206, V208, V209, V211, V212, V213, V214, V215, V217, V218, V219, V221, V222, V225, V226, V227, V229, V230, V231, V232, V233, V234, V235, V236, V237, V238, V242, V243, V244, V245, V247, V250, V251, V252, V256, V257, V260, V262, V263, V264, V267, V268, V269, V274, V275, V276, V277, V279, V280, V282, V283, V284, V285, V286, V288, V289, V291, V293, V294, V295, V296, V297, V298, V299, V301, V303, V304, V305, V306, V307, V308, V310, V311, V312, V313, V314, V316, V317, V318, V319, V320, V322, V324, V325, V326, V327, V328, V329, V330, V331, V332, V337, V338, V341, V342, V343, W2, W3, W4, W6, W7, W8, W15, W17, W22, W23, W25, W26, and W27.

235. The Prosecution notes that these allegations vary in their context: some imply that the appropriations were attributable to the actions of individual IDF soldiers, while others report simply that the government of Israel as a whole failed to return property which had been temporarily seized from the boarded vessels. Many passengers report reassurances from IDF personnel that their property would be returned, either at Ashdod, the airport, or subsequently.

236. The Prosecution further recalls the acknowledgement in the Turkel Report that, in searching the detainees, "large sums of cash were found on some of the IHH activists".[414] Furthermore, some small proportion of the cash allegedly carried by the passengers appears to have been successfully concealed during the search, but then left (apparently inadvertently) in the cells of the "Ella" prison.[415] According to the Turkel Report, the IDF also initiated "seven criminal investigations against 16 suspects for various incidents of theft of property belonging to the flotilla participants".[416] These investigations do not, however, appear to match the extent of the appropriations alleged in the information now in the Prosecution's possession.

237. The available information, including that newly made available, does not alter the legal analysis in the Report concerning article 8(2)(a)(iv).[417] However, the Prosecution acknowledges that, *if* the present analysis had been conducted under article 53(1) as part of the original preliminary examination, it would also have proceeded to consider whether there was a reasonable basis to believe that offences under article 8(2)(b))(xvi) were made out. The reported appropriation of cash in such

[412] For this purpose, the Prosecution has classified individual reported losses equal to or exceeding 1,000 US dollars, Euros, or pounds sterling as a "significant" sum. A considerable number of other detainees reported the loss of smaller sums of money.
[413] These include V3, V8, V9, V15, V20, V22, V34, V35, V37, V38, V50, V59, V67, V71, V73, V75, V82, V92, V98, V113, V123, V125, V130, V141, V155, V159, V162, V173, V177, V183, V187, V188, V195, V196, V199, V212, V213, V215, V219, V226, V230, V234, V242, V260, V267, V268, V275, V279, V283, V285, V301, V303, V304, V305, V311, V314, V316, V328, V329, V338, W4, W6, and W23.
[414] Turkel Report, para. 145.
[415] Turkel Report, para. 159 ("in the prison cells in which the flotilla participants were held in the 'Ella' prison, sums of cash were found in the amount of €3,500 and $4,000", which were since "held in the safe of the legal department of the Prison Service").
[416] Turkel Report, para. 160.
[417] *See above* para. 232. In particular, the "protected property" element would remain unsatisfied.

quantities may indeed, in suitable circumstances, be a basis on which to consider that the appropriation was for personal gain.

238. In the circumstances of this review under article 53(4), however, the Prosecution has further considered whether concluding that an additional offence was committed—under article 8(2)(b)(xvi)—would affect the ultimate conclusion of the Report: that there is no potential case arising from this situation of sufficient gravity to be admissible at the Court. The Prosecution has concluded that this is not the case.

- First, the Prosecution notes the recent observation by the *Al Mahdi* Trial Chamber that "crimes against property are generally of lesser gravity than crimes against persons."[418]

- Second, the Prosecution notes that, in contrast to other circumstances in which acts of pillage are prosecuted at this Court, the losses suffered by the victims have not generally been reported to be significant to their livelihoods as a whole. (The Prosecution acknowledges, however, a small number of accounts where the deprivation of property appears to have caused significant personal hardship.) Likewise, although the Prosecution notes some indications that some of the cash reported missing may have been the result of informal charitable contributions, the Prosecution does not find this factor, in these circumstances, to be significant in assessing the nature of the crimes.

- Third, the Prosecution does not find any information suggesting that the appropriations were conducted on the basis of a plan or policy, or that they were authorised or condoned by the IDF. To the contrary, the IDF appears to have taken some steps to investigate and to punish conduct of this nature. There is also no information suggesting that the perpetrators of any pillage

[418] *Al Mahdi* TJ, para. 77.

which occurred are the same persons as the perpetrators of other identified crimes.

239. Accordingly, having determined that its ultimate conclusion—that it may not initiate an investigation—would *not* be affected by making an additional finding under article 8(2)(b)(xvi), the Prosecution does not consider it necessary to exercise its discretion to reconsider the Report in this respect. Nor does anything in the allegations concerning the appropriation of property otherwise require or justify departing from the conclusions of the Report in any other respect.

III. 2. Information newly made available does not require or justify departing from the conclusions in the Report

240. In the context of all the available information, including the newly provided information, the Prosecution has further considered the following 15 arguments raised by the Comoros or the legal representatives of the victims based upon information made available after the publication of the Report.[419] These relate to:

- Alleged halt of the *Mavi Marmara* at the time of the boarding operations;
- Alleged targeting of Palestinians during the boarding operations;
- Alleged attempt to assassinate a particular passenger;
- Alleged ulterior motive for the boarding operations;
- Alleged live fire, prior to the boarding operation;
- Allegations related to the volume of fire during the boarding operations;
- Alleged attacks on passengers not resisting the boarding operation;

[419] These arguments were notably presented in the victims' observations filed before the Pre-Trial Chamber, and in the Comoros' series of letters of 2016.

- Allegations related to the existence of a list of certain passengers;
- Alleged deliberate denial of medical treatment to wounded passengers;
- Allegations related to the treatment of detained passengers;
- Alleged desecration of the bodies of deceased passengers;
- Alleged failure by the IDF to use alternative means to halt the *Mavi Marmara*;
- Significance of destruction of CCTV and other recorded media;
- Timing and location of the boarding operation;
- Alleged involvement of the "highest ranking Israeli politicians and military commanders".

241. For the reasons which follow, the Prosecution has determined that none of these issues requires or justifies departing from the original conclusions in the Report, under article 53(4).

III. 2. a. Alleged halt of the Mavi Marmara *at the time of the boarding operation*

242. Having considered all the available information concerning the motion of the *Mavi Marmara* at the time of the boarding operation, nothing requires or justifies departing from the original conclusions in the Report, under article 53(4).

243. In litigation before the Pre-Trial Chamber, independent Counsel for the victims argued that the vessels of the flotilla "were *stationary* when the IDF launched its attack".[420] W28, whose statement was only provided to the Prosecution in 2016, also

[420] Victims' Observations (Independent Counsel), para. 21.

believed this to be the case. In this context, the victims invited the Prosecution to infer that the boarding operation was unnecessary.

244. For the reasons set out below, even if the *Mavi Marmara* had been stationary, this would not necessarily have rendered the boarding operation unnecessary or unlawful.[421]

245. Yet, in any event, the information available—and the Comoros' own recent submissions[422]—do not support the conclusion that the *Mavi Marmara* was stationary.

- First, W24—who would have been in a position to know the *Mavi Marmara*'s course and speed—recalls that, "[w]hen the attack started", the vessel changed course "from 185 to 270 towards west moving away further from the Israeli waters." W24 also states that the *Mavi Marmara*'s engines were stopped only once the IDF secured the bridge. V82—whose professional responsibilities would also have made him aware of such issues—also concurs in this recollection.

- Second, consistent with W24's account, an analytical document submitted to the Prosecution by the Comoros, prepared by a third party, purports to present apparently reliable data from an open source maritime tracking system ("AIS", or "Automatic Identification System"), operating at the material time. This shows the *Mavi Marmara* sailing on a course of 185° at 7 knots at "[0]4:27:52", and then changing course and speed to 12.5 knots by 04:53:51 and 13 knots by 05:06:48, before coming to a near halt by 05:51:58.

246. Accordingly, the Prosecution reaffirms its view that the *Mavi Marmara* and the flotilla were under way at the time of the boarding operation.

[421] *See below* paras. 322-327. *See also* Prosecution Response to Victims, para. 133.
[422] *See below* para. 323.

III. 2. b. Alleged targeting of Palestinians during the boarding operation

247. Having considered all the available information concerning the alleged targeting of Palestinians during the boarding operation, nothing requires or justifies departing from the original conclusions in the Report, under article 53(4).

248. In litigation before the Pre-Trial Chamber, independent Counsel for the victims alleged that Palestinian passengers were "singled out and abused".[423] Although without access at that time to the statements on which independent Counsel relied, the Prosecution provisionally expressed its view that there was not a reasonable basis to believe Palestinians were specifically the object of discrimination.[424]

249. The information as a whole, including the information newly available, sustains this conclusion.

- Although W26, whose statement was only provided to the Prosecution in 2016, believes he saw a Palestinian discriminated against, he does not explain the basis for his conclusion.[425] To the extent that the person described may have been O2, other accounts agree that he may have been assaulted, but ascribe a different motivation to the incident.

- W1, a Palestinian, believed there were only four or five of "us Palestinians" on the ship—by which the Prosecution understands that he may mean to include also W16, W20, W27, and W28. However, none of these persons suggests that they were subject to discrimination aboard the *Mavi Marmara*. Indeed, W16 recalls that the IDF did not realise their citizenship until the *Mavi Marmara* had arrived at Ashdod.

[423] *See* Victims' Observations (Independent Counsel), paras. 13, 28-29, 56.
[424] *See* Prosecution Response to Victims, para. 134 (noting "the context of all the information" then 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 passengers").
[425] For example, W26 simply states that he saw "an English Palestinian passenger get kicked by an Israeli soldier for no reason other than because he was Palestinian", and asserts that the soldier "knew he was Palestinian and that's why they chose to kick him"—but does not state how the soldier knew the passenger was Palestinian.

- Likewise, V268—who is also Palestinian—believes that he was mistreated (including while he was medically evacuated) because "they thought I was a Turk" and "didn't know that I am an Arab".

250. More generally, however, the Prosecution notes the views of some detainees aboard the *Mavi Marmara* that women and individuals who appeared to be "Western" may have received more favourable treatment than others.[426] The Prosecution does not, however, consider the available information sufficient to reach a conclusion at the necessary standard in this respect, having regard to the other factors which might equally account for the apparently preferential treatment provided. The Prosecution further notes in this context V245's opinion that the crew of the *Mavi Marmara* also received more favourable treatment once they were identified to the IDF.

251. Accordingly, on the information presently available, the Prosecution finds nothing unreasonable in its conclusion in the Report that there was no reasonable basis to believe Palestinians were targeted for the identified crimes.

III. 2. c. Alleged attempt to assassinate a particular passenger

252. Having considered all the available information concerning the alleged attempt to assassinate a particular passenger during the boarding operation, nothing requires or justifies departing from the original conclusions in the Report, under article 53(4).

253. In litigation before the Pre-Trial Chamber, independent Counsel for the victims contended that there is information suggesting "the IDF attempted to assassinate a

[426] These include V109 (stating that, as "a Western woman", she felt she received preferential treatment, and considered the Israelis to be "clearly racist" towards "Turkish and Arab men"), V203 (stating that "men, especially non-European men, seemed to be treated more harshly" than a "European woman"), V213 (stating that "[t]he 'non-white' passengers were treated much worse than the 'whites' like myself"), V222 (suggesting that "Turkish men were put on their knees and hand-cuffed in front of us who sat: women and European citizens"), V278 (speculating whether "the soldiers were more lenient" with her because they "had found me with the wounded men" or "because I am white skinned"), and W13 (recalling his view that "only the Europeans were on the benches").

prominent Palestinian cleric", Sheikh Raed SALAH, "on board the *Mavi Marmara*".[427] The Prosecution responded that there was no reasonable basis for it to reach such a conclusion, given the information available to it at that time.[428]

254. The information newly available sustains this conclusion. Although five persons report that the IDF was unusually careful in the way it treated Sheikh Raed SALAH—and that IDF personnel were apparently already aware of his presence on the *Mavi Marmara*—this is not especially notable given his political prominence. Just one person's account includes an allegation directly supporting a deliberate attempt on his life, and this is anonymous triple hearsay, based on an incident which did not occur aboard the *Mavi Marmara* and at an unknown time and location.

- W1 states that, after the IDF had secured the *Mavi Marmara*, soldiers "were asking in particular for Sheikh Raed SALAH". When they found him, they asked him to confirm his identity and took him to another part of the ship.

- W20 saw the IDF soldiers as they handcuffed Sheikh Raed SALAH on the *Mavi Marmara*, and saw one of them greet him by name. The soldiers took his picture, and video recorded the moment in which he was handcuffed, which they did not do for other passengers. Sheikh Raed SALAH was also unusual because, unlike other elderly passengers, his handcuffs were not subsequently removed. Like W1, W20 saw the IDF verify Sheikh Raed SALAH's identity. At some point, W20 "learn[ed]" that Sheikh Raed SALAH's name was on a list carried by some of the IDF soldiers, which featured other passengers. In his opinion, Sheikh Raed SALAH looks like Ibrahim BILGEN, who had been killed. Some friends of W20 had also told him, at some point, that they had overheard "a retired Israeli intelligence officer" make a comment suggesting an intention to assassinate Sheikh Raed SALAH. W20 also believes that, quite

[427] *See* Victims' Observations (Independent Counsel), paras. 13, 30.
[428] Prosecution's Response to Victims, para. 135.

soon after the boarding operation, a member of the Israeli government erroneously stated that Sheikh Raed SALAH had been killed; later that morning, the police took his wife to the morgue to attempt to identify a body. Once the *Mavi Marmara* docked at Ashdod, W20 saw the "Israeli Chief of General Staff, Gabi ASHKENAZI," board the ship and look "carefully" at Sheikh Raed SALAH.

- W27 saw one of the IDF soldiers seem "surprised" when they encountered Sheikh Raed SALAH on the *Mavi Marmara*. After the attack, he learned of "the list of targeted people that they wanted to assassinate"—but acknowledges that he has "never seen the list physically" and only inferred "that they were trying to assassinate him" from his inclusion on the list he had never seen. At Ashdod, W27 saw a group of people, including Gabi ASHKENAZI, board the ship, "focused on Sheikh Raed."

- V197 says that he saw the "Chief of Staff of Israel" board the *Mavi Marmara* at Ashdod, approach Sheikh Raed SALAH, and ask for his passport. "When he saw that he was alive, he got angry and left." V197 believes that Ibrahim BILGEN was killed "because he looked like" Sheikh Raed SALAH.

- W28 only heard that Sheikh Raed SALAH might have been "of special interest" once she was ashore in Israel. She heard people ask repeatedly whether he was alive, and was told "about the list and that it was reported that Raed SALAH was reported as killed."

255. The available information does not provide any basis to evaluate how the rumour of Sheikh SALAH's death might originally have been triggered. However, absent any more specific information to the contrary, this rumour is more likely to be the result of confusion than conspiracy. The Prosecution also notes that, once the

rumour had started, the IDF would have had a positive interest in proving that Sheikh Raed SALAH was alive and well.

256. Furthermore, the Prosecution recalls that the information available does not establish a reasonable basis to believe that Ibrahim BILGEN was specifically targeted, even on the basis of mistaken identity, but rather appears to have been killed in the midst of the confusion on the top deck.[429]

257. The Prosecution also notes its conclusion concerning the list of certain passengers found on the *Mavi Marmara*.[430]

258. In the light of all these considerations, and given all the information presently available, the Prosecution reaffirms its view that there is no reasonable basis to believe that an attempt was made to assassinate Sheikh Raed SALAH. As such, these allegations show nothing unreasonable in the conclusions of the Report.

III. 2. d. Alleged ulterior motive for the boarding operation

259. Having considered all the available information concerning the alleged ulterior motive for the boarding operation, nothing requires or justifies departing from the original conclusions in the Report, under article 53(4).

260. In litigation before the Pre-Trial Chamber, independent Counsel for the victims suggested that the object of the boarding operation was "to send a message".[431] The Prosecution has now also received the statement of W28, in which she expresses a similar opinion. However, from the context of her observation, it is clear that she refers generally to her inference from the political climate in which the boarding operation occurred, and not to any facts known specifically by her.

[429] *See* Annex D.
[430] *See below* paras. 283-286.
[431] *See* Victims' Observations (Independent Counsel), paras. 17, 53, 62.

261. The Prosecution has already stated its view that the public statements of certain Israeli officials, although serving an obvious political agenda, neither claimed to represent the operational planning of the IDF nor asserted the ulterior motive which has been suggested.[432] Remarks suggesting that some political figures perceived an association between the flotilla passengers and Hamas likewise are immaterial since there is no information suggesting that any such opinions influenced the conduct of the perpetrators reasonably believed to have committed crimes. To the contrary, the available information suggests that the IDF was briefed to anticipate resistance only from "peace activists".[433]

262. Accordingly, in the absence of any relevant new fact or information at all, the Prosecution will not exercise its discretion under article 53(4).

III. 2. e. Alleged live fire prior to the boarding operation

263. Having considered all the available information concerning the alleged use of live fire prior to the boarding operation, nothing requires or justifies departing from the original conclusions in the Report, under article 53(4).

264. In litigation before the Pre-Trial Chamber, independent Counsel for the victims reiterated the Comoros' claim that IDF personnel started to fire live ammunition before the boarding commenced.[434] Consistent with its previous observations,[435] however, the Prosecution stated that such information, even if newly available, would not materially affect the analysis underlying the Report, given the acknowledgement of "significantly conflicting accounts of when live ammunition

[432] Prosecution Response to Victims, para. 138.
[433] Report, para. 106; Prosecution Response to Victims, para. 139. *See also* para. 140.
[434] *See* Victims Observations (Independent Counsel), para. 19 (citing V50, V109, V187, V312, W1, W16, and W28).
[435] *See e.g. above* paras. 34, 94, 99-106.

was first used and from where it emanated" and the possibility that live fire commenced before boarding.[436]

265. Moreover, as already noted, the pertinent question is only whether the allegations of live fire prior to the boarding operation are such that they provide a reasonable basis to believe that the identified crimes on the *Mavi Marmara* were committed according to a plan or policy.[437] Similarly, the location from which a shot may have been fired—including potentially from a helicopter or boat—is not important of itself, but only to the extent it too relates to the existence of a plan or policy.[438]

266. By a letter of January 2016, the Comoros referred the Prosecution to the accounts of eight persons—new information, which was only received by the summer of 2016[439]—which it considered relevant to the question of pre-boarding live fire.[440] In further letters of 8 June and 31 August 2016, the Comoros drew the

[436] Prosecution Response to Victims, para. 141. *See also* para. 142.
[437] *See above* paras. 101-105, 123-126.
[438] In this context, the Prosecution also notes the report provided by the Comoros at the end of January 2017 ("P1 Report"), prepared by independent pathologist P1. The observations in the P1 Report are based on P1's visit to the *Mavi Marmara* in 2016, unrecorded "conferences and consultations" with a third party "ballistics expert", secondary review of relevant material similar to that available to the Prosecution ("photographs and video material" of damage to the *Mavi Marmara*, and "autopsy photographs, autopsy videos and […] autopsy reports"), and "[i]nterviews" by P1 with V343, V284, V58, V132, and one person whose account has not been made available to the Prosecution. P1 suggests that there is some physical evidence of "high velocity bullet damage" to the *Mavi Marmara*—although no rounds of this type were recovered from the vessel—and that the "direction and nature" of this damage was more consistent with shots being fired "from another vessel in an almost horizontal direction" and/or from above (*i.e.* from a helicopter). P1 also acknowledges, however, that "[i]t was difficult to be more specific about the damage to the superstructure as a consequence of the time since the event and multiple episodes of decoration of the ship". Nor is the assessment of ballistic damage to ships P1's area of expertise. Accordingly, and without disputing P1's expertise in his own discipline, the Prosecution approaches P1's conclusions with caution. Moreover and in any event, for the reasons previously set out, even if P1's conclusions are correct, they do not of themselves, or in combination with the other available information, require or justify the Prosecutor departing from her conclusion concerning any alleged plan or policy to commit the identified crimes. *See above* paras. 124-126.
[439] *See* Annex E.
[440] These include V106, V116, V193, V196, V199, V279, W8, and W23. In addition, the Comoros referred to V181, whose statement has only been made available in Turkish, and the accounts of seven additional persons for whom the Prosecution continues to hold no statement at all.

Prosecution's attention to an additional 30 specific accounts among the newly available information.[441]

267. Having reviewed all the information, including the newly available information, the Prosecution notes that in total at least 82 persons perceived fire (with lethal or less-lethal ammunition) emanating from the boats or helicopters, and that some of these persons believed that this fire commenced before the boarding had commenced.[442] However, for the reasons previously described, the Prosecution stresses that it approaches these accounts with caution, given the considerable danger of honest mistake inherent in these circumstances.[443]

268. Indeed, the need for such caution is illustrated, for example, by the number of persons who allege that IDF soldiers were shooting as they were rappelling down onto the *Mavi Marmara*.[444] Yet such a feat was deemed "unlikely" in the Palmer-Uribe Report.[445] Similarly, a report prepared by a retired army officer,[446] at the request of the Comoros, stated that it would "exclude the possibility" of fire from soldiers as they were in the act of rappelling to the deck, since rappelling is generally a "two-

[441] *See* Letter of 8 June 2016; Second Letter of 31 August 2016. These include V4, V13, V20, V22, V23, V26, V41, V43, V53, V56, V63, V64, V68, V80, V91, V110, V116, V119, V141, V163, V164, V186, V187, V197, V224, V230, V236, V266, V267, and V328. The Comoros also referred to V58, whose statement was already in the possession of the Prosecution when the Report was published.
[442] These include: V3, V4, V6, V11, V13, V20, V22, V23, V43, V47, V48, V50, V56, V58, V63, V64, V68, V79, V80, V82, V92, V98, V106, V110, V113, V115, V116, V119, V120, V122, V131, V132, V141, V146, V163, V164, V167, V177, V179, V186, V187, V193, V196, V197, V199, V203, V213, V218, V224, V226, V230, V236, V265, V266, V267, V268, V283, V284, V285, V293, V295, V305, V312, V313, V316, V321, V323, V324, V328, V332, V338, V343, W4, W9, W13, W16, W18, W25, W26, W27, W28, and O12. *See also* P1 Report (for analysis, *see above* fn. 438). The statements of some persons identified by the Comoros—such as V26, V41, V53, and V91—were more ambiguous in the extent to which they made these allegations.
[443] *See above* paras. 104-123.
[444] These include, for example, V88, V91, V115, V167, V184, V186, V205, V214, V283, V323, V324, V326, V328, and W15.
[445] Palmer-Uribe Report, para. 122.
[446] Since the Comoros has not indicated whether this report is provided on a public or confidential basis, the Prosecution provisionally refers to this retired military officer as "M1", and his report the "M1 Report". M1 is a retired officer whose experience includes more than a decade "working as a military operations officer", and "five years investigating and analysing conflicts and military operations as a peacekeeper".

handed operation especially when doing so onto a moving platform, in haste and in conditions of limited visibility".[447]

269. Consistent with the Prosecution's own reasoning,[448] M1 also identifies the "limited visibility" during the boarding operation, the indistinguishable nature of the sounds of lethal and less-lethal fire, and the ability of IDF soldiers to switch rapidly between the two types of ammunition, as factors which are likely to have caused the passengers to mistake less-lethal fire for live fire.[449] This further underlines the need for caution in evaluating the allegations concerning the use of live fire.

270. The M1 Report suggests that the "firing of live ammunition from a helicopter above occurred immediately prior to, and during the descent or rappelling onto the upper deck by soldiers", apparently on the basis that such an order of events would be consistent with a standard infantry assault drill known as "fire and manoeuvre".[450] M1 also suggests that the "aggressive behaviour" of the IDF, once they had boarded the *Mavi Marmara*, was consistent with "soldiers sweeping through an objective suppressing any remaining opposition and consolidating that seizure."[451]

271. M1's analysis in this respect does not seem consistent with the apparent facts, especially the manner in which the first troops deployed from the first helicopter. If the IDF plan had been to use the fire and manoeuvre tactic from the outset, as M1 implies,[452] the same logic would have dictated the use of heavy covering fire from the outset, in order to ensure that the IDF soldiers had the maximum protection at their

[447] M1 Report, para. 44.
[448] *See above* paras. 107-119.
[449] *See* M1 Report, paras. 37-38.
[450] M1 Report, paras. 43, 45.
[451] M1 Report, para. 46.
[452] *See e.g.* M1 Report, para. 48 (concluding that the "vertical attack from helicopters, while being supported by live fire from above, was a conventional warfare manoeuvre, conducted not against combatants but civilians"). *See also* para. 49.

point of maximum vulnerability (the point when the first soldiers were alone on the deck). Yet this does not seem to be what occurred. Rather, the first troops arriving on the *Mavi Marmara* were quickly overwhelmed by a crowd which was on the deck and waiting for them—and evidently hadn't been swept away by covering fire at this point. No witness contradicts this point.[453] These circumstances may thus be consistent with a less aggressive initial approach, initially refraining from use of covering fire and then reacting as events on the deck escalated. In and of itself, the Prosecution does not consider that the use of "fire and manoeuvre" as a tactic *when confronted with resistance* establishes a reasonable basis to believe that the passengers were themselves the intended object of attack.

272. For all these reasons, M1's observations in this respect do not materially affect the Prosecution's analysis concerning the absence of any organised plan to use lethal force aggressively against the passengers of the *Mavi Marmara*.

273. In this regard, the Prosecution further recalls the circumstances of the 10 deceased victims, as suggested by the available information.[454] With one exception, the injuries sustained by these victims generally appear to be consistent with the conduct of persons on the decks of the ship, although some rounds could have emanated from a high place such as a helicopter. There is, however, no reasonable basis to believe that any of the persons killed on the top deck were wounded before the first IDF soldier arrived on deck.

274. By contrast, there is a reasonable basis to believe that Ugur Suleyman SOYLEMEZ, who was located at the stern of the *Mavi Marmara* on a lower deck, might have been fatally wounded by a live round fired from one of the boats,

[453] *But see* V3, who does suggest that a soldier from the helicopter was shooting at the deck "to clear the way to the soldier who was being brought down sliding from the rope". On the other hand, V266 states that "Because they were coming down on the ship, the passengers on the top deck were trying to resist them and the soldiers started to fire."
[454] *See* Annex D.

potentially before the first IDF soldier boarded the ship.[455] Yet even if so, this incident still does not establish a reasonable basis to believe the identified crimes were committed according to a plan or policy. In particular, the Turkel Report is explicit in recounting the orders of the senior IDF officers in the boats that live ammunition was not to be used until a much later point. Accordingly, to any extent that Mr SOYLEMEZ might have been killed by an aimed live round emanating from one of the boats, it appears to have been contrary to orders and forbidden.

275. Accordingly, given all these considerations, the Prosecution reaffirms its view that the victims' perceptions concerning the use of live fire do not show the analysis in the Report to be unreasonable. To any limited extent that live fire may exceptionally have been used before the boarding began, as the Report always recognised, such an occurrence still would not establish a reasonable basis to believe that the identified crimes were committed according to a plan or policy, given the circumstances identified.

III. 2. f. Allegations related to the volume of fire during the boarding operation

276. Having considered all the available information concerning the alleged volume of fire during the boarding operation, nothing requires or justifies departing from the original conclusions in the Report, under article 53(4).

277. In litigation before the Pre-Trial Chamber, independent Counsel for the victims noted victims' recollections of the noise and chaos of the boarding operation, characterised by their perception of "shooting from everywhere".[456] The information newly available, as well the information previously available, is consistent with this perception. In particular, 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

[455] *See* Annex D.
[456] *See* Victims' Observations (Independent Counsel), paras. 22-23.

and non-lethal force. It is also uncontested that the IDF encountered violent resistance in boarding the *Mavi Marmara*. The Prosecution has also determined that there is a reasonable basis to believe that some violent crimes were committed in the course of these events.[457]

278. In this context, the Prosecution reaffirms its view that the victims' perception of the volume of fire does not show the analysis in the Report to be unreasonable.

III. 2. g. Alleged attacks on passengers not resisting the boarding operation

279. Having considered all the available information concerning alleged attacks on passengers aboard the *Mavi Marmara* who were not resisting the boarding operation, nothing requires or justifies departing from the original conclusions in the Report, under article 53(4).

280. In litigation before the Pre-Trial Chamber, independent Counsel for the victims referred to allegations that passengers aboard the *Mavi Marmara* continued to be attacked after an attempt had been made by some passengers to communicate surrender to the IDF, or when attempting to assist the injured.[458] Although the Prosecution had not previously received a statement from some of these individuals, it stated that this information is consistent with the conclusions of the Report. It was in this context, among others, that the Prosecution had determined that there was a reasonable basis to believe that the crimes of wilful killing and wilfully causing serious injury had been committed aboard the *Mavi Marmara*.[459]

281. Nothing in the available information, including the information newly made available, changes this view. Thus, although at least 44 persons allege that a

[457] *See* Prosecution Response to Victims, para. 143.
[458] *See* Victims' Observations (Independent Counsel), paras. 24-25 (citing V187 V278, V298, W17, W23, and O13).
[459] *See* Report, paras. 59, 75; Prosecution Response to Victims, para. 144.

passenger not resisting the boarding operation was subject to attack,[460] this falls within the Prosecution's conclusion that there was a reasonable basis to believe that as many as "50-55 passengers" might have been victims of wilfully causing serious injury.[461] The Prosecution notes that, in its letter of 8 June 2016, the Comoros also emphasised the accounts of 15 of these same persons.[462]

282. Accordingly, the Prosecution reaffirms its view that the allegations related to attacks on persons not resisting the boarding operation do not show the analysis in the Report to be unreasonable.

III. 2. h. Allegations related to the existence of a list of certain passengers

283. Having considered all the available information concerning the existence of a list of certain passengers aboard the *Mavi Marmara*, nothing requires or justifies departing from the original conclusions in the Report, under article 53(4).

284. In litigation before the Pre-Trial Chamber, independent Counsel for the victims recalled that the IDF were seen to have a list identifying certain passengers by name and photograph, including the Palestinian passengers.[463] The Prosecution noted that this information, including some images which appear to represent the list itself, was already among the materials which had been made available.[464] In particular, since the persons named on the list were not apparently united by nationality or ethnicity,

[460] These include V15, V27, V28, V33, V43, V53, V56, V58, V63, V64, V67, V68, V74, V82, V83, V88, V91, V112, V118, V119, V129, V132, V138, V153, V190, V197, V225, V226, V232, V233, V238, V254, V266, V267, V272, V284, V298, V299, V303, V311, V321, V343, and W18. In the context of the allegations by some passengers that shooting continued after some individuals had attempted to surrender—such as by waving a white shirt, or making announcements over the *Mavi Marmara*'s PA system—the Prosecution notes that such a surrender, even if effectively communicated to the IDF, would not in the circumstances necessarily have been understood to apply to all passengers. V131, for example, noted that he did not immediately comply with the PA announcement because he was unsure if it was made under duress.
[461] *See* Report, paras. 75, 77, 82. The Prosecution recalls that it makes this assessment, at the preliminary examination stage, without reference to the question of any possible defences.
[462] These include V27, V28, V43, V53, V56, V63, V68, V74, V80, V91, V119, V132, V138, V267, and V343. In the case of V43, who was shot while bringing the abducted IDF soldiers out onto the bow of the ship, the Prosecution also notes the account of the relevant IDF soldiers: *see* Turkel Report, para. 139. Other persons cited by the Comoros, such as V71 and V269 were on vessels other than the *Mavi Marmara*.
[463] *See* Victims' Observations (Independent Counsel), para. 27.
[464] Prosecution Response to Victims, para. 145.

nor were all aboard the *Mavi Marmara*, the Prosecution concluded that there was no reasonable basis to believe that the list identified persons to be targeted for crimes.

285. Nothing in the available information, including the information newly made available, changes this view. The Prosecution notes that various persons refer to the existence of the list, and some speculate (although without any particular foundation) that it might be a "death list".[465] On the other hand, as W16 points out:

> It's hard to tell what the Israelis wanted from this list. It is an interesting list because Sheikh Raid [sic] is on the list who Israel doesn't like, and there is an American activist. It's a strange list and mixed. It's not a group of dangerous activists. Greta and Mary Hughes, who is the founder of the Free Gaza Movement, and they were on the list but not on the boat.

286. Accordingly, the Prosecution reaffirms its view that the allegations related to the existence of a list of certain passengers aboard the *Mavi Marmara* do not show the analysis in the Report to be unreasonable.

III. 2. i. Alleged deliberate denial of medical treatment to wounded passengers

287. Having considered all the available information, nothing in the alleged deliberate denial of medical treatment to wounded passengers aboard the *Mavi Marmara* requires or justifies departing from the original conclusions in the Report, under article 53(4).

288. In litigation before the Pre-Trial Chamber, independent Counsel for the victims asserted that medical assistance to wounded passengers was deliberately denied or impeded by IDF soldiers after the *Mavi Marmara* was secured, and that this information was "overlooked by the Prosecutor".[466] Yet, to the contrary, although the Prosecution noted that some of the allegations presented by the victims were based

[465] These include V92, V197, V213, V284, V321, W13, and W16. W1, W20, W27 and W28 also stated that they heard of the list, but did not see it.
[466] *See* Victims' Observations (Independent Counsel), para. 39 (quoting V50, V109, V116, V268, V278, W12, and W28).

on information which was not in its possession when preparing the Report,[467] it stated that it had originally concluded:

> [T]here is no reasonable basis to believe that the mistreatment of passengers included the deliberate denial of medical treatment. 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. 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. The Prosecution notes that claims relating to abuse or rough treatment of wounded passengers would already fall within this latter finding.[468]

289. Having reviewed the new information provided, in the context of the information already in its possession, at least 82 persons have now alleged that the IDF delayed or denied the provision of medical assistance to wounded passengers.[469] At least 27 of these persons further alleged that one or more wounded persons died as a result.[470] On the other hand, the Prosecution also notes accounts of wounded detainees attempting to hide their wounds out of fear,[471] and that at least 25 wounded passengers were medically evacuated from the *Mavi Marmara* by helicopter.[472] Other passengers apparently assessed as having less serious wounds remained on the *Mavi Marmara*,[473] but were then re-triaged and transferred to hospital as necessary at Ashdod.[474]

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[467] Prosecution Response to Victims, para. 149.
[468] Prosecution Response to Victims, para. 148. *See also* para. 151.
[469] These include V4, V8, V9, V17, V31, V34, V37, V39, V40, V42, V45, V51, V52, V55, V56, V63, V64, V67, V72, V73, V77, V89, V93, V94, V101, V106, V109, V110, V112, V116, V117, V118, V119, V121, V132, V140, V144, V146, V153, V154, V155, V159, V160, V162, V171, V173, V177, V197, V203, V211, V213, V217, V220, V221, V226, V231, V233, V236, V238, V240, V243, V249, V254, V263, V266, V272, V273, V282, V298, V299, V304, V318, V321, V322, V329, V332, V333, W3, W4, W12, W19, and W24.
[470] These include V8, V9, V17, V31, V55, V56, V64, V67, V112, V140, V144, V146, V153, V159, V162, V173, V220, V231, V233, V238, V243, V254, V273, V299, V333, W4, and W19.
[471] V136, V226, and W28, among others, describe this phenomenon.
[472] These include V28, V36, V52, V53, V58, V63, V68, V115, V128, V132, V163, V184, V188, V193, V219, V268, V272, V283, V284, V297, V320, V323, V326, V343, and W29.
[473] These include V13, V15, V29, V39, V54, V59, V72, V80, V83, V91, V101, V112, V121, V159, V167, V168, V178, V195, V211, V233, V237, V238, V295, V298, V308, V314, V316, V329, V330, and W7.
[474] *See above* para. 209.

290. For the reasons which follow, the Prosecution reaffirms its view that there is no reasonable basis to believe that IDF soldiers systematically or deliberately delayed or denied the provision of medical assistance to wounded passengers aboard the *Mavi Marmara*. To the contrary, the available information appears to show an effort to provide the necessary medical care, although this effort may at times have been compromised by the circumstances.

- First, notwithstanding the common belief among a number of persons that one or more deaths occurred as a result of medical neglect after the IDF secured *Mavi Marmara*, this is inconsistent with the available information. Rather, a number of persons appear to have died in the passengers' custody in the sickbay, *before* the IDF had secured the *Mavi Marmara* and thus were in any position to take responsibility for the provision of medical care. Other persons appear to have died where they fell on the exterior decks, before the IDF asserted disciplined control over this area. The Prosecution notes information suggesting that one person, Necdet YILDIRIM, may have died as a result of excessive blood loss from wounds sustained while he was attempting to access the top deck, but the circumstances remain unclear.[475]

- Second, the available information, such as the accounts of V59, V186, V213, V278, V303, V341 and W28, does suggest that there was a significant hiatus between the IDF securing control of the exterior decks of the *Mavi Marmara* and attempting to assert control over the passengers in the interior. Although this hiatus may in turn have delayed the provision of medical assistance by the IDF, it did not appear to impede the passengers' continued provision of care (to the extent possible) for those wounded passengers who had already reached the sickbay. Nor does any of the available information suggest that any of the wounded passengers died or came to harm in the sickbay during

[475] *See* Annex D.

this period. Likewise, when the IDF asserted control, the wounded appear to have been effectively triaged. In this context, and provided the IDF medical care was adequate, measures to prevent detainees in IDF custody from attempting to assist the wounded themselves (such as those described by V24, V42, and V254)[476] cannot be considered as an improper interference in the provision of medical assistance.

- Third, further inconsistent with the alleged deliberate denial of medical assistance are the various acts of medical assistance carried out by the IDF after they had secured control of the *Mavi Marmara*.[477] The Prosecution acknowledges allegations, however, that some of these acts may have been carried out roughly and/or inexpertly, but these do not detract from the apparent overall effort at complying with the IDF's legal responsibility to treat the wounded. Nonetheless, in a small number of cases, such as that of V101, necessary medical care does not appear to have been provided, either on the *Mavi Marmara* or in Israel.

291. For all these reasons, the Prosecution reaffirms its view that the allegations concerning the deliberate denial of medical assistance do not show the analysis in the Report to be unreasonable.

III. 2. j. Allegations related to the treatment of detained passengers

292. Having considered all the available information concerning the alleged treatment of detained passengers aboard the *Mavi Marmara*, nothing requires or justifies departing from the original conclusions in the Report, under article 53(4).

293. In litigation before the Pre-Trial Chamber, independent Counsel for the victims recited various accounts of mistreatment suffered by passengers aboard the *Mavi*

[476] These accounts, among others, are cited by the Comoros: *see* Letter of 8 June 2016.
[477] In addition to the accounts of medical evacuations in necessary cases, V335 for example describes "Israeli" personnel "making simple treatments on wounded passengers".

Marmara while they were detained *en route* to Ashdod.[478] The Prosecution noted that, although it had not previously received a statement from some of these individuals, it had "considered and expressly referred to all these same kinds of mistreatment in the Report, which formed the basis for its finding that there was a reasonable basis to believe outrages upon personal dignity were committed."[479] Conversely, it noted that allegations of mistreatment ashore, once the detainees had been removed from the *Mavi Marmara*, did not form part of the Prosecution's analysis since they occurred outside the Court's jurisdiction.[480]

294. Nothing in the available information, including the newly available information, alters these conclusions. The victims' accounts of their treatment while detained, both aboard the *Mavi Marmara* and subsequently once transferred to Israeli territory,[481] remain consistent with the Prosecution's previous analysis.

295. In this context, the Prosecution notes the general opinion recently expressed by M1 (based on his own review of some or all of these same accounts) that detainees shared a "common experience" which was "consistent even when [they] passed through the hands of different entities: military (army), police, intelligence and security and prison service."[482] However, beyond the fact that detainees reported, in varying numbers, some form of mistreatment at each stage of their journey from the *Mavi Marmara* to the airport, the nature of this common experience is unexplained and unclear. M1's further inference that an experience of such "consistency" can "be

[478] *See* Victims' Observations (Independent Counsel), paras. 42-46 (quoting V50, V58, V109, V116, V187, V206, V279, V297, V325, W16, W23, and O13).
[479] Prosecution Response to Victims, para. 152.
[480] Prosecution Response to Victims, para. 153. *See also* para. 154 (recalling that, although allegations of the use of force on other vessels of the flotilla had been noted, "there is no information supporting the allegation that mistreatment or force occurred on all seven vessels of the flotilla"). *See further* Prosecution Response to Comoros, paras. 91-93.
[481] *See above* paras. 188-203 (victims' accounts of treatment as detainees aboard the *Mavi Marmara*), 204-211 (accounts of treatment at Ashdod), 212-222 (accounts of detention in Israel), 223-231 (accounts of treatment at the airport).
[482] M1 Report, para. 51.

assumed to be deliberate and […] sanctioned by those relevant authorities" appears to be based on an incorrect premise.[483]

296. To the contrary, the Prosecution maintains its view, previously stated before the Pre-Trial Chamber, that it can find no reasonable basis to infer that the identified crimes aboard the *Mavi Marmara*, including outrages upon personal dignity, were committed systematically or on a planned basis.[484]

297. The Prosecution further recalls that independent Counsel for the victims referred to "sexual […] humiliation" of detainees by the IDF, citing W23's account of insufficient privacy when she was searched at Ashdod, and W16's and O13's report of insulting remarks.[485] M1 now also suggests that "a study should be made of the incidents of sexual and gender-based violence (SGBV) that occurred during the operation".[486] Yet the Prosecution has not found a reasonable basis to believe that such incidents were committed within the Court's jurisdiction.

298. Furthermore, and in any event, although the Prosecution has remarked upon the number of allegations concerning the manner in which searches were carried out at Ashdod,[487] the available information shows that particular incidents which might be considered improper on their face—including W23's experience[488]—were ultimately averted by the insistence of the detainees concerned.[489] Additionally, the possible conduct of intimate searches out on some detainees may nonetheless be lawful if carried out under the proper legal and physical conditions. In the

[483] M1 Report, para. 52.
[484] *See* Prosecution Response to Comoros, para. 88 (noting that "the information highlighted by the Comoros appears to concern a variety of Israeli personnel in a variety of locations and does not seem to relate especially to the IDF troops who boarded the Three Vessels, or persons in those troops' chain of command").
[485] *See* Victims' Observations (Independent Counsel), para. 44.
[486] M1 Report, para. 54.
[487] *See above* paras. 207-208.
[488] The Prosecution notes that it does not have in its possession the particular account by W23 to which independent counsel appeared to refer.
[489] Although such incidents could in principle still amount to outrages upon personal dignity in appropriate circumstances, as verbal harassing behaviour, these specific incidents appear to be of limited impact upon the victims concerned.

circumstances, and particularly in the absence of the Court's jurisdiction and any material relevance to the identified crimes in this situation, the Prosecution has refrained from attempting such an analysis.

299. For all these reasons, the Prosecution reaffirms its view that the allegations concerning the treatment of detained passengers do not show the analysis in the Report to be unreasonable.

III. 2. k. Alleged desecration of the bodies of deceased passengers

300. Having considered all the available information, nothing in the alleged desecration of the bodies of two deceased passengers aboard the *Mavi Marmara* requires or justifies departing from the original conclusions in the Report, under article 53(4).

301. In litigation before the Pre-Trial Chamber, independent Counsel for the victims submitted that the bodies of two persons killed aboard the *Mavi Marmara* may have been desecrated.[490] The Prosecution noted that this allegation had not previously been considered in the preliminary examination, and that none of the information originally available had suggested such an allegation.[491]

302. None of the newly available information sheds any more light on these allegations. In particular, neither of the statements to which independent Counsel have referred have been provided to the Prosecution.[492] None of W23's other statements refers to this allegation.

[490] *See* Victims' Observations (Independent Counsel), para. 43. In particular, it was alleged that dogs had bitten the W23's husband after he had died, and that soldiers had urinated on the body of the brother of "Hasan YILDRIZ".
[491] Prosecution Response to Victims, para. 155. The Prosecution noted, however, that a statement in its possession concerning one of the witnesses concerned—W23—described seeing "dogs' faces smeared in blood" and "wonder[ing] if they had attacked" people or "ripped up the corpses". Concerning the use of military working dogs, *see further above* paras. 192-194.
[492] *See* Prosecution Response to Victims, para. 155 (noting that "[t]he relevant victims of course retain the option to submit the underlying materials to the Court for consideration").

303. Accordingly, in the absence of any relevant new fact or information at all, the Prosecution will not exercise its discretion under article 53(4).

III. 2. l. Alleged failure by the IDF to use alternative means to halt the Mavi Marmara

304. Having considered all the available information, nothing in the alleged failure by the IDF to attempt to use alternative means to halt the *Mavi Marmara* requires or justifies departing from the original conclusions in the Report, under article 53(4).

305. In its letter of 31 March 2016, the Comoros stated that in its view the available information shows that the IDF failed to rely "on the well-established 'rules of the road' at sea to divert the Flotilla" from its course, and that in particular:

> By simply ordering the IDF warships and boats to sail directly towards the Flotilla, the ships in the Flotilla would have *had* to turn to starboard (i.e. to the right and thus further away from the coast of Israel/Gaza). […] No attack and boarding would have been necessary.[493]

306. The Prosecution further notes M1's opinion that:

> If the vessel fails to comply with requests to cease its journey, then shots across the bow would have been the understood threat-of-escalation procedure. […]
>
> Another option is the age-old maritime expedient of 'ramming'. This occurred quite frequently during wartime but also it was a useful means to avoid direct hostilities in demonstrating a right to deny passage. It was used, for example, during the Icelandic and UK 'Cod Wars' when unarmed fishing trawlers found themselves opposed by Icelandic coastguard vessels. This procedure includes blocking the passage of a ship by sailing directly towards it, thereby forcing it to follow the rules of passage at sea by turning it and thus diverting its course to sail away from its intended destination. In the Iceland example, no boarding ever occurred as there was no justification for it.[494]

[493] Letter of 31 March 2016. Subsequently, the Comoros also refers to the possibility of "employing the well-known 'shot across the bow' as a further means to avoid any supposed *need* to attack and board the Flotilla".
[494] M1 Report, paras. 35-36.

307. The Turkel Report states that the relevant IDF operational order expressly permitted the use of various measures to halt the flotilla, including "forcing the vessels to change their course or stop by means of missile ships, crossing bows, firing warning shots in the air and 'white lighting' (blinding using a large projector)".[495] The IDF Chief of Staff noted in his testimony to the Turkel Commission, however, that "the order does not obligate the use of all the means" but only "mentions all the means that may be used", from which the commander must then select "the means suitable for the matter".[496]

308. Although the Turkel Report does not state the basis upon which the IDF determined that it would proceed by way of a surprise boarding operation, the Palmer-Uribe Report states:

> The Israeli Point of Contact emphasized the comments in the Israeli report that "the possibilities for performing a 'cold stop' of the vessels had proved to be impractical" given the size of the *Mavi Marmara* and the number of passengers and vessels in the flotilla.[497]

309. The Palmer-Uribe Report disagreed with this assessment, and stated that it was "unconvinced" that it was necessary or appropriate to "skip these steps".[498]

310. The Turkel Report concluded that the planning and organisation of the operation was open to "critique" but did not find that this "led to a systemic misapplication of force by the soldiers involved or a breach of international law":[499]

> As has been noted, the technical means and operational doctrine for stopping vessels on the high seas, and particularly one the size of the *Mavi Marmara*, are quite limited. The large number of civilian passengers on board and the potential for collateral damage further increased the challenge. However, clear

[495] Turkel Report, para. 121.
[496] Turkel Report, para. 121, fn. 453.
[497] Palmer-Uribe Report, para. 111.
[498] Palmer-Uribe Report, para. 111. *See also* paras. 112, 114-116.
[499] Turkel Report, para. 248.

> warning and the controlled and isolated use of force may have helped avoid a wider and more violent confrontation such as the one that occurred. […]
>
> However, the issue of warnings would not necessarily have been feasible or effective. For example, warning shots intended to stop a ship may have limited effect, depending on a number of factors, including the weather, the state of the sea, and the available weapons. Further, warning shots can only be used when other ships or personnel will not be endangered. The presence of a large number of vessels taking part in this incident is therefore a significant complicating factor.[500]

311. In the context of these analyses, the Prosecution also takes into account the size of the *Mavi Marmara* (approximately 4,000 tonnes) relative to the size of the largest surface vessel of the Israeli Navy (the Sa'ar 5 corvette: approximately 1,200 tonnes).[501] It notes the limited visibility prevailing at the time selected for the operation. It also recalls that previous IDF efforts to intercept (much smaller) vessels attempting to sail to Gaza had apparently resulted in collisions on at least one occasion.[502]

312. The Comoros' observation that the *Mavi Marmara*'s captain has subsequently "confirmed" that he would not have "sought to confront, let alone to collide, with the IDF warships" is, in this context, irrelevant.[503] The proper question is only what the IDF might reasonably have appreciated at the time they were called upon to decide their course of action. In this context, the Comoros' further implication that it would be "absurd" for the IDF even to have contemplated the possibility "that the *Mavi Marmara* might have rammed an IDF vessel on the High Seas" does not seem consistent with the facts—especially given the common sense fact that most collisions, between any kind of traffic, are generally accidental rather than intentional, and yet occur anyway. Indeed, it is only reasonable to conclude that

[500] Turkel Report, para. 247.
[501] V116 asserts that the Israeli ships intercepting the flotilla include "a big corvette" or "class five Sahar", as well as "four […] corvettes of 4.5 classes". The Prosecution is not in a position to comment on V116's basis for reaching these conclusions, but notes that Sa'ar 5 and Sa'ar 4.5 corvettes are indeed the principal surface combatant vessels of the Israeli navy. The Sa'ar 4.5 corvette is approximately half the size of the Sa'ar 5.
[502] *See e.g.* Turkel Report, paras. 25, 181. V203 also refers to this incident.
[503] Letter of 31 March 2016.

professional sailors will *always* consider the conduct of close manoeuvres between large vessels at sea, in the dark, at speed, to bear an appreciable risk.[504]

313. In all these circumstances, the Prosecution reaffirms its view that no material inference can be drawn from the IDF's decision not to attempt to cause the flotilla to change course by the use of measures including warning shots, "crossing the bows", or ramming.

314. The Comoros further asserts that the IDF did not attempt a "cold stop" of the *Mavi Marmara* or other vessels, by which it means "disabling propellers or rudders without boarding".[505] M1 likewise suggests that, "it would have been expected to make an attempt to disable the steering and control mechanisms."[506] Neither the Comoros nor M1, however, explains how such a measure might feasibly have been attempted in the circumstances, other than by firing directly on the *Mavi Marmara* (with all the attendant risks for the passengers aboard).[507] Accordingly, the Prosecution again reaffirms its view that no material inference can be drawn from the IDF's decision not to attempt such a course of action.

315. Finally, the Comoros refers to the lack of a "*final* warning […] issued by the IDF before the attack and boarding", which it considers "compatible" with "an intention *not* to deploy best-practice peaceful methods".[508] Yet it does not follow from the lack

[504] *See also* Turkel Report, para. 181 ("[t]he large size of the *Mavi Marmara* and a number of the other flotilla vessels made 'shouldering' (i.e., brushing up against the side of the ship) of those vessels impractical and also very dangerous for Israeli forces").
[505] Letter of 31 March 2016.
[506] M1 Report, para. 35.
[507] In one statement, V278 remarks that: "We had many people on board who were knowledgeable about boats and everyone of them agreed that the most logical course of action for Israeli would be to put a rope or chain into the propeller to stop the boat and that we would be unable to do anything to prevent them". V321 and W16 also refer to shipboard discussion of the same possibility. In the circumstances, the Prosecution is unable to evaluate this form of 'hearsay expertise'. Yet even if this opinion is correct, there would still remain the apparent practical difficulty in the circumstances of carrying out such manoeuvres given the number of vessels in the flotilla, their size, and the prevailing conditions. The Turkel Commission likewise noted that, although a variety of tactics have been "tried over the years"—including "directing fire hose streams into the fleeing vessel's exhaust stack to flood the engine" and "deploying nets, lines and other devices designed to entangle the vessel's propellers"—"[t]hese tactics have enjoyed only limited success and often pose considerable danger to the ship, the crew, and any passengers on board": *see* Turkel Report, para. 181.
[508] Letter of 31 March 2016.

of a "final" warning—especially when four previous warnings had already been given that night, of which the last was only two hours before the boarding operation[509]—that the IDF acted in "complete disregard of all of the internationally accepted practices and procedures at sea". To the contrary, as noted in the Report, "an attempt to use the element of surprise is reasonably consistent with an effort to reduce the potential for confrontation".[510]

316. In light of all these considerations, the Prosecution cannot concur in the Comoros' submission that "[t]he IDF and those planning this attack […] *knew* they were acting unlawfully—criminally indeed—from the start", simply in "ordering the boardings".[511] Nor therefore can it share in the inference that the intent behind the boarding operation was "to terrorise peaceful demonstrators *never again* to dare to confront the State of Israel" or "to demonstrate IDF prowess by killing, injuring and abusing the civilian passengers who sought to aid those living under the blockade in Gaza."[512] For these reasons, there is no reasonable basis for the Comoros' submission that the *modus operandi* of the boarding operation demonstrates a plan or policy to commit the identified crimes, material to the Prosecution's assessment of gravity.

317. Accordingly, nothing in these allegations shows that the conclusions in the Report were unreasonable.

III. 2. m. Significance of destruction of CCTV and other recorded media

318. Having considered all the available information, nothing in the alleged destruction and/or confiscation of recorded media from the *Mavi Marmara*, including CCTV footage and equipment, requires or justifies departing from the original conclusions in the Report, under article 53(4).

[509] *See* Report, paras. 94, 105.
[510] Report, para. 105.
[511] Letter of 31 March 2016.
[512] Letter of 31 March 2016.

319. In its letter of 31 March 2016, the Comoros renewed its request for the Prosecution to draw inferences from "the IDF's absolute and systematic determination to remove and keep from public scrutiny all audio and video records made by the passengers on the Flotilla of the killings and other attacks".[513] It contends that the "State of Israel, through its military and political leaders, must have ordered the seizure of all recording equipment", and that the "refusal" to return any equipment or resulting footage "shows the State's own complicity in the criminality of the attack."[514]

320. The Prosecution has already determined that it is neither required under article 53(3) to reconsider the Report, based on the information originally available concerning the alleged destruction of CCTV cameras, nor is it justified in doing so.[515] Nor indeed does any of the information newly made available to it now alter this assessment, in the context of article 53(4).

321. To the contrary, although the Prosecution has received a small amount of relevant new information,[516] this information does not materially affect the reasoning in the Report since it had in any event accepted the allegation as true *arguendo*.[517] It follows that this allegation cannot show that the conclusions in the Report were unreasonable.

[513] Letter of 31 March 2016. The Comoros had also previously advanced this argument in litigation before the Pre-Trial Chamber: *see e.g.* Request for Review, para. 124; Prosecution Response to Comoros, para. 85.
[514] Letter of 31 March 2016.
[515] *See above* paras. 148-154.
[516] In its letter of 8 June 2016, the Comoros referred to the accounts of four persons (V109, V116, V138, and V203) in support of its allegation concerning the destruction of CCTV cameras and recorded media. From the information in the Prosecution's possession, only V109—whose relevant statement (alleging that she saw at least one IDF soldier stealing CCTV cameras) was in any event already considered by the Prosecution in preparing the original Report—is actually relevant to this claim. From its own analysis, however, the Prosecution has identified three further persons (V50, V82, and W9) who make similar allegations. In an e-mail of 12 June 2015, V50 alleges that the IDF soldiers "broke all [the] surveillance cameras with the backs of their rifles so they won't be photographed or getting caught on tape". V82, one of the crew of the *Mavi Marmara*, also refers to the IDF "dismantl[ing]" the "security system". W9 saw a "few" soldiers "shooting these cameras one by one to prevent any recording".
[517] *See above* paras. 151-153 (in all the circumstances, however, this allegation did not establish a reasonable basis to believe that the identified crimes were committed according to a plan or policy).

III. 2. n. Timing and location of the boarding operation

322. Having considered all the available information, nothing in the timing or location of the boarding operation requires or justifies departing from the original conclusions in the Report, under article 53(4).

323. In its letter of 31 March 2016, the Comoros asserts that the timing and location of the boarding operation are of "immense significance when considering the intention of the IDF" and of the Israeli government. In particular, the Comoros stresses two facts which are not in dispute—that the flotilla had not yet reached the zone of the blockade itself at the time of the boarding operation, and that the flotilla was "sailing in the direction of the coast of Egypt, not Gaza, and had been doing so" for more than an hour. The Comoros claims that this evinces an intention "to attack civilians *come what may* even if they were nowhere near the area of the blockade and not then heading to Gaza."[518]

324. As a preliminary matter, the Prosecution notes that the Comoros' position now appears to be inconsistent with the position formerly taken by the victims—represented by the same Counsel—that the *Mavi Marmara* was "stationary" at the time of the boarding operation.[519]

325. The Prosecution also recalls that, "if it is assumed that Israel's blockade of Gaza was legal",[520] vessels breaching or attempting to breach a blockade are subject to attack if, having received prior warning, they intentionally and clearly refuse to stop

[518] Letter of 31 March 2016.
[519] *See above* paras. 243, 245-246.
[520] The Prosecution did not consider it necessary to resolve this issue for the purpose of this preliminary examination, and this was not questioned by the Pre-Trial Chamber. *See further* Prosecution Response to Comoros, para. 45.

or resist visit, search, or capture.[521] Vessels which have demonstrated an intention to run a blockade may be intercepted before they enter the prohibited area.[522]

326. From the facts of this situation, there is no question that the *Mavi Marmara* and the flotilla not only a.) expressed a clear intention to sail to Gaza in breach of the measures imposed by Israel; b.) received clear warnings; c.) intentionally and clearly resisted attempts by the IDF to conduct a visit or search. Although the course steered by the vessels at the time of the attack is a relevant consideration, it cannot itself be dispositive.

327. In this context, therefore, the Comoros's assertion that the timing and location of the boarding operation necessarily renders it a "a clear and grave interference with the right to freedom of navigation and the international use of the High Seas" is no more than a disagreement with the original Report, as well as the governing law. It is not based on any new fact or information. In such circumstances, the Prosecution will not exercise its discretion under article 53(4).

III. 2. o. Alleged involvement of the "highest ranking Israeli politicians and military commanders"

328. Having considered all the available information, nothing in the alleged involvement of the "highest ranking Israeli politicians and military commanders" requires the Prosecution to reconsider the Report under article 53(4).

329. In its letter of 31 March 2016, the Comoros refers to the presence of the "Commander of the Navy" during the boarding operation,[523] and thus reasons that

[521] *See* Report, paras. 91-92.
[522] *See* Report, para. 91, fn. 163 ("although Israel intercepted the flotilla 64 nautical miles from the coast of Gaza, *opinio juris* and relevant provisions of the [San Remo Manual] generally appear to permit capture of blockade-runners on 'the high seas even at a distance from the area of naval operation and prior to breach of any cordon'", citing Guilfoyle, at 197; *San Remo Manual*, paras. 14, 146(f); Palmer-Uribe Report, paras. 109-110).
[523] Letter of 31 March 2016. This is supported by the Turkel Report (*see* Turkel Report, paras. 121, 242), which states that the Commander of the Navy had overall command of the operation, reporting to the IDF Chief of Staff, although the Comoros appears to confuse the Commander of the Navy with the commander of one of the assault elements when they suggest that he was "on an IDF boat" during the attack. *See* Letter of 31 March 2016

the "military and political hierarchy" were "intimately connected" to the "decisions being made as the operation unfolded". It also stresses that the operation was planned "in various meetings prior to the attack", some of which "involved the highest ranking Israeli politicians and military commanders".[524] Again, the Prosecution notes that the Turkel Report supports the view at least that senior members of the IDF were engaged with the planning of the operation (at least up to the level of the IDF Chief of Staff),[525] although it stressed that "the level of violent resistance on the part of the flotilla participants" was "clearly underestimated".[526]

330. The Comoros is incorrect, however, in concluding that the gravity of any potential case arising from this situation is indicated by these facts.[527] As already stated, considering all the available information, there is presently no reasonable basis to believe that the senior figures to which the Comoros refers are the persons implicated *in the identified crimes*,[528] which cannot reasonably be suspected to have been committed as part of a plan or policy. Accordingly, the seniority of these figures is, in and of itself, irrelevant.

331. Lacking any relevant new fact or information, again, the Prosecution will not exercise its discretion under article 53(4).

Conclusion

332. Consistent with article 53(3)(a) of the Statute and rule 108(3), and based on the above reasoning and the information available on 6 November 2014, the Prosecution hereby decides to uphold the disposition of the Report. There remains no reasonable basis to proceed with an investigation, since there is no reasonable basis to conclude

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(citing Turkel Report, para. 129); Turkel Report, paras. 121, 129 (referring to the presence in one of the Morena boats of the commander of the takeover force, who was the officer in charge of one of the assault elements seeking to board the *Mavi Marmara*).
[524] Letter of 31 March 2016.
[525] *See e.g.* Turkel Report, paras. 119-121, 126, 242.
[526] Turkel Report, paras. 119, 243. *See also* Report, paras. 107, 109.
[527] Letter of 31 March 2016.
[528] *See above* paras. 94, 166-170.

that any potential case arising from the situation would be of sufficient gravity to be admissible before the Court.

333. Furthermore, having considered all the available information, including the information made available since 6 November 2014, the Prosecution does not find it necessary to exercise its residual discretion under article 53(4) of the Statute to reconsider the conclusions of the Report. There is no new fact or information which materially alters the analysis in the Report, as confirmed in this final decision.

334. For these reasons, the preliminary examination of this situation must be closed, subject to any future determination by the Prosecution under article 53(4).