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PRE-TRIAL CHAMBER I

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

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

Confidential

with confidential *ex parte* Annex 1, only available to the OPCV and the OTP

**Victims' Response to the Application for Judicial Review
by the Government of the Union of the Comoros**

Source: Office of Public Counsel for Victims

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

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I. Introduction

1. The Principal Counsel of the Office of Public Counsel for Victims, acting as legal representative of the unrepresented victims (the "Principal Counsel"),¹ supports the Union of the Comoros' request for the Chamber to review the result of the Prosecutor's reconsideration of her decision not to investigate the situation relating to the incidents allegedly committed on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (the "Request for Review").²

2. The Principal Counsel submits that the Chamber has jurisdiction to entertain the Request for Review under article 53(3)(a) of the Rome Statute (the "Statute"). Said jurisdiction is consistent with rule 108(3) of the Rules of Procedure and Evidence (the "Rules"), the inherent powers of the Chamber, the Prosecutor's independence, and the object and purpose of the Rome Statute.

3. The Principal Counsel agrees with the Comoros that the Prosecutor has failed to comply with the Review Decision insofar as she has not considered and applied the legal and procedural criteria set by the Chamber in said Decision. As a result, the Prosecutor has reiterated her initial conclusions on the potential perpetrators of the crimes, and on the scale, nature, manner of commission and impact of the crimes.

4. The Principal Counsel submits that had the Prosecutor applied all the legal requirements provided by the Chamber in the Review Decision, she could only have

¹ See the "Decision on the Victims' Participation in the Situation" (Pre-Trial Chamber I), No. ICC-01/13-18, 24 April 2015, para. 17; and the "Decision on the Requests for Withdrawal of the Legal Representative of Victims pursuant to Regulation 82 of the Regulations of the Court" (Pre-Trial Chamber I), No. ICC-01/13-54, 26 September 2016.

² See the "Application for Judicial Review by the Government of the Union of the Comoros", No. ICC-01/13-58-Conf, 26 February 2018 (the "Request for Review").

reasonably concluded that the gravity criterion for the purposes of article 53(1)(b) of the Statute is met. In these circumstances, since the requirements of article 53(1)(a) and (b) are met, taking into account the interests of the victims and the Prosecutor's discretion, any decision not to initiate an investigation could only have been taken under article 53(1)(c) of the Statute – requiring the Prosecutor to show that there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

II. Confidentiality

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this submission is filed confidentially because it makes reference to submissions filed with the same classification. A public redacted version will be filed in due course. Annex 1 is filed confidential *ex parte* only available to the OPCV and the OTP because it is a document produced by the Prosecution containing the identity of certain individuals and for which the Prosecution has consented to be annexed to the present submission.

III. Background

6. On 14 May 2013, the authorities of the Union of the Comoros (the “Comoros”) referred to the Prosecutor the situation relating to the incidents allegedly committed from 31 May 2010 through 5 June 2010 on registered vessels of the Comoros, the Hellenic Republic and the Kingdom of Cambodia bound for the Gaza Strip.³

7. On 6 November 2014, the Prosecutor issued a report in which she concluded that there is “[a] reasonable basis to believe that war crimes under the Court’s jurisdiction

³ See the “Annex 1: Decision Assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I” (Presidency), No. ICC-01/13-1-Anx1, 5 July 2013.

have been committed in the context of interception and takeover of the Mavi Marmara by IDF soldiers on 31 May 2010”, but considering that “[t]he potential case(s) that would likely arise from an investigation into the situation would not be of sufficient gravity to justify further action by the Court and would therefore be inadmissible pursuant to articles 17(1)(d) and 53(1)(b) of the Statute”, she decided that “[t]here is no reasonable basis to proceed with an investigation and [...] decided to close this preliminary examination” (the “Decision Not to Investigate”).⁴

8. On 29 January 2015, the Comoros requested Pre-Trial Chamber I (the “Chamber”) to review the Decision Not to Investigate, and to direct the Prosecutor to reconsider said Decision under article 53(3)(a) of the Rome Statute (the “First Request for Review”).⁵

9. On 16 July 2015, the Chamber rendered its decision on the First Request for Review, requesting the Prosecutor to reconsider the decision not to initiate an investigation into the situation referred to her by the Comoros (the “Review Decision”).⁶

10. On 27 July 2015, the Prosecutor filed the Notice of Appeal of the Review Decision (the “Notice of Appeal”).⁷

⁴ See “Situation on Registered Vessels of Comoros, Greece, and Cambodia: Article 53(1) Report”, No. ICC-01/13-6-AnxA, 4 February 2015 (dated 6 November 2014), paras. 149-151 (the “Decision Not to Investigate”).

⁵ See the “Application for Review pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation in the Situation”, No. ICC-01/13-3-Conf, 29 January 2015 (the “First Request for Review”).

⁶ See the “Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation” (Pre-Trial Chamber I), No. ICC-01/13-34, 16 July 2015 (the “Review Decision”).

⁷ See the “Notice of Appeal of the ‘Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation’”, No. ICC-01/13-35, 27 July 2015 (the “Notice of Appeal”).

11. On 6 November 2015, the majority of the Appeals Chamber found inadmissible the Prosecutor's appeal against the Review Decision (the "Review Decision Appeal Judgment").⁸

12. On 29 November 2017, the Prosecutor notified her conclusions and the reasons for said conclusions after completing her reconsideration of the Decision Not to Investigate (the "Prosecutor's Final Decision").⁹

13. On 26 February 2018, the Comoros filed the Request for Review,¹⁰ requesting the Chamber to review the Prosecutor's Final Decision.

14. On 2 March 2018, the Chamber extended until 3 April 2018 the time limit for responding to the Request for Review.¹¹

15. On 13 March 2018, the Prosecution responded to the Request for Review (the "Prosecution's Response"),¹² requesting the dismissal *in limine* for lack of jurisdiction, and the stay of the deadline to respond to the merits of said Request pending a ruling on jurisdiction.

16. On 15 March 2018, the Comoros requested the Chamber to maintain the 3 April 2018 time limit for the submissions on jurisdiction and the merits, or, in the

⁸ See the "Decision on the admissibility of the Prosecutor's appeal against the 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation'" (Appeals Chamber), No. ICC-01/13-51 OA, 6 November 2015 (the "Review Decision Appeal Judgment"). See also the "Joint dissenting opinion of Judge Silvia Fernández De Gurmendi and Judge Christine Van Den Wyngaert", No. ICC-01/13-51-Anx OA, 6 November 2015.

⁹ See the "Annex 1 to the Notice of Prosecutor's Final Decision under Rule 108(3)", No. ICC-01/13-57-Anx1, 30 November 2017 (dated 29 November 2017) (the "Prosecutor's Final Decision").

¹⁰ See *supra* note 2.

¹¹ See the "Decision on the Request for an Extension of Time" (Pre-Trial Chamber I), No. ICC-01/13-60, 2 March 2018.

¹² See the "Prosecution's Response to the Government of the Union of the Comoros' "Application for Judicial Review" (ICC-01/13-58) (Lack of Jurisdiction)", No. ICC-01/13-61, 13 March 2018 (the "Prosecution's Response").

alternative, to permit the Comoros to respond by said date to the Prosecution's *in limine* challenge on jurisdiction.¹³

17. Pursuant to regulation 38(2)(d) of the Regulations of the Court, the Principal Counsel hereby files her response to the Request for Review presenting arguments on both the jurisdictional issues and the merits.

IV. Submissions

18. As a preliminary matter, the Principal Counsel notes that the mandate of two members of the Chamber dealing with this situation from the outset, Judge Aluoch and Judge Tarfusser, came to an end on 10 March 2018, and that Pre-Trial Chamber I was recomposed on 16 March 2018.¹⁴

19. In this regard, the Principal Counsel supports the Comoros' submission that the Chamber that decides on the Request for Review should remain composed as much as possible as it was when it issued the Review Decision in 2015.¹⁵

20. Accordingly, pursuant to articles 36(10) and/or 39(3)(a) of the Statute,¹⁶ it would be in the interests of justice for Judge Tarfusser to continue serving as a member of the Chamber that decides on the Request for Review. Judge Tarfusser considered the Prosecutor's Decision Not to Investigate together with the relevant evidence and continues serving at the Court beyond 10 March 2018 in the case of the *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*. He is therefore in an excellent

¹³ See the "Application by the Government of the Comoros regarding the Pre-Trial Chamber's Scheduling Order", No. ICC-01/13-62, 15 March 2018.

¹⁴ See the "Décision concernant l'élection du juge président" (Pre-Trial Chamber I), No. ICC-01/13-64, 21 March 2018, para. 1.

¹⁵ See the Request for Review, *supra* note 2, footnote 6.

¹⁶ See the "Decision assigning judges to divisions and recomposing Chambers" (Presidency), No. ICC-01/13-63, 16 March 2018, p. 6, footnote 11.

position to examine and rule on the Request for Review in an expeditious and fully informed manner.

21. A similar approach has been adopted at other international criminal tribunals, where judges have been allowed to continue hearing the matters they were involved in after their mandate came to an end, in order to ensure the expeditiousness of the proceedings.¹⁷

22. Regarding the content of the Request for Review, the Principal Counsel agrees with the Comoros that the Prosecutor's Final Decision contains, in fact, two decisions of a different nature,¹⁸ namely (i) the decision taken pursuant to the Review Decision (the "Prosecutor's Reconsideration Decision"),¹⁹ and (ii) a decision independently adopted pursuant to article 53(4) of the Rome Statute on the basis of new facts and information received after the Review Decision (the "Prosecutor's Decision on New Evidence").²⁰

23. As discussed in the following paragraphs, the Principal Counsel also agrees with the Comoros that the Chamber may review both decisions mentioned *supra*, although she considers that the scope and consequences of the Chamber's review must be different for each decision, in light of their different nature.

¹⁷ For the continuation of ICTR Judges Dolenc (Slovenia) and Maqutu (Lesotho) through the completion of the *Kajelijeli* and *Kamuhanda* cases, see Letter from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2003/550, 19 May 2003; and Resolution 1482 (2003), UN Doc. S/RES/1482 (2003), 19 May 2003. For the continuation of ICTY Judge Canivell (Spain) through the completion of the *Krajišnik* case, see Identical letters from the Secretary-General to the President of the General Assembly and the President of the Security Council, UN Doc. S/2006/199-A/60/740, 29 March 2006; and Resolution 1668 (2006), UN Doc. S/RES/1668 (2006), 10 April 2006.

¹⁸ See the Request for Review, *supra* note 2, paras. 1 and 21.

¹⁹ See the Prosecutor's Final Decision, *supra* note 9, paras. 95-170 (the "Prosecutor's Reconsideration Decision").

²⁰ See the Prosecutor's Final Decision, *supra* note 9, paras. 171-331 (the "Prosecutor's Decision on New Evidence").

1. The Chamber has jurisdiction to hear the Request for Review

a. Power of the Chamber to review the Prosecutor's Final Decision

24. The Principal Counsel agrees with the Comoros that the Prosecutor is bound by the Review Decision and must therefore implement it to correct the errors identified by the Chamber in the Decision Not to Investigate, regardless of whether the Prosecutor disagrees with the Chamber's consideration of the evidence and information in her decision.²¹

25. As a natural consequence of the abovementioned obligation, the Prosecutor's Final Decision resulting from the Review Decision – in this case, a confirmation of the Decision Not to Investigate – may be judicially reviewed to assess whether the errors identified by the Chamber in the Review Decision have been addressed or not by the Prosecutor.

26. The Principal Counsel acknowledges that the Appeals Chamber has clarified that “[i]n the event that, upon review [under article 53(3)(a) of the Rome Statute], 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”.²²

27. Along this line, commentators have stated that “it could not be said that the decision upon reconsideration [under article 53(3)(a) of the Rome Statute] was a decision under paragraphs 1 or 2 [of article 53]. As such, neither the Security Council nor the

²¹ See the Request for Review, *supra* note 2, para. 12.

²² See the Review Decision Appeal Judgment, *supra* note 8, para. 56.

referring State Party would be entitled to request a further review"²³ and that "*la Chambre préliminaire ne peut que demander au Procureur de revoir sa décision* [selon le paragraphe 3.a de l'article 53 du Statut de Rome]: *c'est en effet le Procureur qui conserve le dernier mot!*"²⁴

28. However, neither the Appeals Chamber nor the abovementioned commentators have addressed the situation where the Prosecutor's Final Decision results from the same errors identified by the Chamber during its review of the Decision Not to Investigate.

29. In this regard, the Principal Counsel agrees with the Prosecutor that requests under article 53(3)(a) of the Statute impose on the latter an obligation only of *process*, and not of result.²⁵ The Review Decision is therefore binding on the Prosecutor as to the *process* to be followed when reconsidering the Decision Not to Investigate.

30. Moreover, the Prosecutor is duty bound to respect the interpretation of the law provided by the Chamber in the Review Decision.²⁶ The Review Decision is to this extent like any other decision issued by a Chamber of the Court, namely a "*lawful binding order under the Statute*"²⁷ which the Prosecutor has to comply with.

31. In its review under article 53(3)(a) of the Statute, the Chamber pointed out both *procedural and legal errors* affecting the Decision Not to Investigate.²⁸ In particular, the Chamber expressly stated in the Review Decision that it did not

²³ See BERGSMO, M. et al, "Article 53: initiation of an investigation", in Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd ed. (München/Oxford/Baden Baden: C.H.Beck/Hart/Nomos, 2016), p. 1378, mn. 40 (emphasis added).

²⁴ See BITTI, G., "Article 53: ouverture d'une enquête", in Fernandez and Pacreau (eds.), *Statut de Rome de la Cour pénale internationale* (Paris: Editions Perdone, 2012), p. 1214 (emphasis added).

²⁵ See the Prosecutor's Final Decision, *supra* note 9, para. 3.

²⁶ Cf. *idem*, paras. 51 and 63.

²⁷ *Ibid.*, para. 4.

²⁸ *Ibid.*, para. 52.

address the sign of the Decision Not to Investigate, but rather “*the considerations underlying the final conclusion that an investigation should not be opened*”,²⁹ and that “[t]he scope of review is limited to the issues that are raised in the request for review and have a bearing on the Prosecutor’s conclusion not to investigate”.³⁰

32. Given the binding nature of the Review Decision explained *supra*, the Principal Counsel submits that the Prosecutor cannot indirectly challenge now the Chamber’s findings in the Review Decision and fully disregard them on the alleged basis that “*there is no obvious forum for the Prosecution and Pre-Trial Chamber to resolve and reconcile any differences in their view of [articles 15 and 53]*”.³¹

33. The abovementioned claim must be disregarded because the alleged impossibility to challenge the findings reached by the Chamber in the Review Decision is only attributable to the very Prosecutor (*allegans suam turpitudinem non est audiendus*). The deadline for an interlocutory appeal against the Review Decision elapsed without the Prosecutor seeking leave under article 82(1)(d) of the Statute, and the Prosecutor’s appeal against the same decision under article 82(1)(a) of the Statute was dismissed for lack of jurisdiction.³²

34. In fact, the Principal Counsel notices that almost half of the Prosecutor’s Final Decision is phrased as a sort of appeal which the Prosecutor could have brought under article 82(1)(d) of the Statute against the *procedural rulings* contained in the Review Decision³³ and which mirrors the three grounds of appeal that were

²⁹ See the Review Decision, *supra* note 6, para. 8 (emphasis added).

³⁰ *Idem*, para. 10 (emphasis added).

³¹ See the Prosecutor’s Final Decision, *supra* note 9, para. 14. See also *idem*, para. 13.

³² See the Review Decision Appeal Judgment, *supra* note 8, para. 50, identifying the nature of the Review Decision for the purpose of interlocutory appeals.

³³ See the Prosecutor’s Final Decision, *supra* note 9, paras. 19, 26, 33, 44, 50, 53, 58, 61, 66, 68, 69 and 71.

dismissed *in limine* by the Appeals Chamber,³⁴ namely the alleged misapplication by the Chamber of the legal standard under article 53(1) of the Statute,³⁵ the alleged misinterpretation of the standard of review under article 53(3)(a) of the Statute,³⁶ and an alleged lack of reasoning in the Review Decision.³⁷

35. In this regard, the Principal Counsel disagrees with the Prosecutor's argument that she is at the liberty of not following the Chamber's guidance provided in the Review Decision when reconsidering her Decision Not to Investigate because the Chamber conducted an impermissible *de novo* review of the Decision Not to Investigate pursuant to article 53(3)(a) of the Statute.³⁸ The Review Decision, far from conducting a *de novo* review, is the mere application of the correct legal standards to the facts relied upon by the Prosecutor in the Decision Not to Investigate.

36. In short, the Principal Counsel submits that the Prosecutor cannot disagree with the law as stated and applied by the Chamber in the Review Decision.³⁹ In particular, the Prosecutor's decision not to depart from her original gravity determination cannot be lawfully based on (i) "the Prosecution's understanding of the proper standard of review under article 53(3)(a)"⁴⁰ regarding the examination of the scale and impact of the crimes; (ii) the allegation that the Chamber unduly "emphasis[ed]

³⁴ See the Review Decision Appeal Judgment, *supra* note 8, para. 52, summarising the three grounds of appeal.

³⁵ Cf. the Prosecutor's Final Decision, *supra* note 9, para. 16; and the Notice of Appeal, *supra* note 7, paras. 20-23.

³⁶ Cf. the Prosecutor's Final Decision, *supra* note 9, para. 36; and the Notice of Appeal, *supra* note 7, paras. 17-19.

³⁷ Cf. the Prosecutor's Final Decision, *supra* note 9, para. 69; and the Notice of Appeal, *supra* note 7, paras. 24-27.

³⁸ See the Prosecutor's Final Decision, *supra* note 9, paras. 57 and 65.

³⁹ *Idem*, paras. 33 and 66 ("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. [...] 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) (emphasis added).

⁴⁰ See the Prosecutor's Final Decision, *supra* note 9, para. 80.

the legal characterisation [of the facts]"⁴¹ regarding the examination of the nature of the crimes; and (iii) the accusation that the Chamber did "*not consider[e] the Report as a whole, and especially the context of violent resistance aboard the Mavi Marmara*"⁴² regarding the manner of commission of the crimes. Any decision by the Prosecutor not to investigate based on the abovementioned grounds alone amounts to not implementing the legal findings in the Review Decision and, thereby, not abiding by said ruling.

37. In exceptional situations, such as the one described above, the Principal Counsel submits that the Chamber has the power to ensure the effectiveness of the Review Decision by reviewing the Prosecutor's Final Decision. This review is consistent with the relevant provisions in the Statute and the Rules, and is a manifestation of the Chamber's inherent power to make its jurisdiction effective.

38. As put forward by the Comoros,⁴³ article 53(3)(a) of the Statute grants the Chamber the power to examine whether the legal and procedural errors it identified in the Decision Not to Investigate have been rectified in the Prosecutor's Final Decision.

39. The Principal Counsel agrees with the Comoros that the wording of article 53(3)(a) of the Statute does not expressly condition the right of a State Party to seek judicial review of the Prosecutor's Decision Not to Investigate to the timing of said decision,⁴⁴ i.e. a State may seek review of both the Prosecutor's first decision on the investigation of the incidents allegedly committed on registered vessels of the Comoros, the Hellenic Republic and the Kingdom of Cambodia and of a subsequent decision by the Prosecutor reviewing a previous decision in this regard.

⁴¹ *Idem*, para. 87.

⁴² *Ibid.*, para. 90.

⁴³ See the Request for Review, *supra* note 2, para. 11.

⁴⁴ *Idem*, paras. 25, 27 and 29.

40. This literal interpretation is consistent with the context of the provision. The Statute identifies the object of the Chamber's review under article 53(3)(a) by reference to article 53(1), i.e. a decision by the Prosecutor "*whether to initiate an investigation [...] having evaluated the information made available to him or her*". Therefore, the object of the review by the Chamber under this provision is only limited by its content, not by its timing.

41. The Principal Counsel posits that this interpretation of article 53(3)(a) of the Statute is also consistent with the expression "final decision" in rule 108(3) of the Rules. Pursuant to this provision, the Prosecutor's Final Decision is entirely "final" only as to the result thereof, namely to start an investigation or not to do so.

42. In this regard, the Appeals Chamber has further clarified that a Chamber can change the "final result" of a Prosecutor's decision not to investigate under article 53(1) of the Statute, and thereby force the start of an investigation, only where the Prosecutor's decision is based on the interests of justice, given the difference in wording between articles 53(3)(a) and 53(3)(b) of the Statute.⁴⁵

43. Consequently, the Principal Counsel acknowledges that the Prosecutor's Final Decision is "final" *as to the result* thereof, since it is purportedly based on article 53(1)(b) of the Statute, namely the alleged lack of gravity of the situation at hand.⁴⁶

44. In this regard, the Appeals Chamber has ruled that the Prosecutor's Final Decision cannot be reversed by the Chamber pursuant to article 53(3)(a) of the Statute *as to its content*, i.e. when the Chamber "*disagrees with the findings or conclusions of the Prosecutor*".⁴⁷

⁴⁵ See the Review Decision Appeal Judgment, *supra* note 8, paras. 58-59.

⁴⁶ See the Prosecutor's Final Decision, *supra* note 9, paras. 95 and 98.

⁴⁷ See the Review Decision Appeal Judgment, *supra* note 8, para. 56.

45. Conversely, the Principal Counsel agrees with the Comoros that rule 108(3) of the Rules allows the Chamber's review of the Prosecutor's Final Decision "*on the basis of errors committed by the Prosecutor*" in responding to the Chamber's request for reconsideration contained in the Review Decision.⁴⁸ In this sense, any decision not to proceed adopted by the Prosecutor under article 53(1) of the Statute is reviewable as to the *method* whereby the Prosecutor has reached said decision.⁴⁹

46. The Principal Counsel submits that the reading of article 53(1), 53(3)(a) and rule 108(3) provided *supra* is consistent with the Review Decision, where the Chamber clarified that

"The object and purpose of article 53(3)(a) of the Statute is to give referring entities the opportunity to challenge, and have the Chamber test, the validity of the Prosecutor's decision not to investigate [...] In the absence of any such disagreement [between the Prosecutor (who decides not to open an investigation) and the referring entity (which wishes that such an investigation be opened)], because either the Prosecutor decides to open an investigation into the referred situation or because the referring entity does not challenge the Prosecutor's decision not to investigate, the Chamber has no competence to review the Prosecutor's decision, subject to its proprio motu power under article 53(3)(b) of the Statute" [...] [t]he review under article 53(3)(a) of the Statute is triggered by a request of the referring entity which has the opportunity to raise before the Chamber any argument it wishes to make in order to challenge the validity of the Prosecutor's follow-up on the referral".⁵⁰

47. Moreover, the Principal Counsel notes that the Prosecutor's Final Decision is premised on her express and frontal disagreement with the *legal and procedural*

⁴⁸ See the Request for Review, *supra* note 2, para. 27.

⁴⁹ *Idem*, para. 29.

⁵⁰ See the Review Decision, *supra* note 6, para. 10 (emphasis added).

findings made by the Chamber in the Review Decision, such as that (i) paragraphs (a) and (b) of article 53(1) of the Statute require the application of “*exacting legal requirements*”;⁵¹ (ii) article 53(1) does not necessitate any “*complex or detailed process of analysis*”;⁵² (iii) the Prosecutor has to investigate conflicting accounts in order to be able to properly assess the relevant facts;⁵³ and (iv) the Prosecutor may not disregard available information other than when that information is “*manifestly false*”.⁵⁴

48. Considering that “*the Chamber request[ed] the Prosecutor to reconsider her decision not to initiate an investigation*”⁵⁵ into the situation referred by the Comoros and that said request necessarily implied an obligation for the Prosecutor to re-assess the information using the criteria determined by the Chamber, the Principal Counsel argues that the Prosecutor’s conscious repetition in her Final Decision of the legal and procedural errors identified by the Chamber in the Review Decision justifies the Chamber’ use of its inherent powers.

49. In this regard, the Chamber already indicated that it “*should knowingly [not] tolerate and [should] request reconsideration of decisions under article 53(1) of the Statute which are erroneous*”.⁵⁶ The Chamber also decided not to address an “*erroneous abstract principle*” relied upon by the Prosecutor because it did not affect the validity of her assessment of gravity.⁵⁷

⁵¹ Cf. the Review Decision, *supra* note 6, para. 14; and the Prosecutor’s Final Decision, *supra* note 9, paras. 15 and 36-52.

⁵² Cf. the Review Decision, *supra* note 6, para. 13; and the Prosecutor’s Final Decision, *supra* note 9, paras. 15 and 26-32.

⁵³ Cf. the Review Decision, *supra* note 6, para. 13; and the Prosecutor’s Final Decision, *supra* note 9, paras. 15 and 53-54. Cf. also the Review Decision, *supra* note 6, para. 36; and the Prosecutor’s Final Decision, *supra* note 9, para. 15.

⁵⁴ Cf. the Review Decision, *supra* note 6, para. 35; and the Prosecutor’s Final Decision, *supra* note 9, paras. 15 and 19-25.

⁵⁵ See the Review Decision, *supra* note 6, para. 50 and p. 26; and the Review Decision Appeal Judgment, *supra* note 8, para. 51.

⁵⁶ See the Review Decision, *supra* note 6, para. 15. Cf. the Prosecutor’s Final Decision, *supra* note 9, para. 39.

⁵⁷ See the Review Decision, *supra* note 6, para. 19 (emphasis added).

50. In these circumstances, the Principal Counsel submits that the Prosecutor's express disregard for the methodological guidance provided by the Chamber and her repetition of the errors identified in the Review Decision as affecting the Final Decision fulfil the requirements set by the Appeals Chamber for the exercise of the Chamber's inherent powers.⁵⁸

51. In particular, the Prosecutor's assessment of gravity contained in the Decision Not to Investigate was subject to the Chamber's review under article 53(3)(a) of the Statute. The guiding factors to assess gravity were determined by the Chamber in the Review Decision and subsequently disregarded in the Prosecutor's Final Decision. Accordingly, the Chamber's power to review the Prosecutor's application of the gravity criteria is an *"incidental legal issue[s] which arise[s] as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction"*.⁵⁹

52. The Principal Counsel stresses that the review by the Chamber of how the Prosecutor has considered the gravity criteria in the Final Decision is consistent with the object and purpose of the Rome Statute. In particular, said review empowers the Court to ensure that the *"most serious crimes of concern to the international community as a whole"* do not go unpunished and that the victims' interests are duly protected.⁶⁰

53. Lastly, the Principal Counsel wishes to highlight that the power of the Chamber identified *supra* to review the Prosecutor's Final Decision does not mean opening the door to a perpetual review of said decision. Indeed, *"[t]he scope of review*

⁵⁸ See the "Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Decision on Sentence pursuant to Article 76 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/13-2276-Red A6 A7 A8 A9, 8 March 2018, paras. 75-76.

⁵⁹ See STL, "Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing" (Appeals Chamber), Case No. CH/AC/2010/02, 10 November 2010, para. 45.

⁶⁰ See the Rome Statute, Preamble, para. 4; and article 68(1).

is limited to the issues that are raised in the request for review and have a bearing on the Prosecutor's conclusion not to investigate".⁶¹

54. Moreover, the review of the Prosecutor's Final Decision does not affect her independence either. As explained by the Appeals Chamber, the final decision as to whether to initiate an investigation or not pursuant to article 53(3)(a) of the Statute lies with the Prosecutor, not with the Pre-Trial Chamber.⁶² The Appeals Chamber also noted that "*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*".⁶³ *A maiore ad minus*, analysing whether the Prosecutor has considered the factors indicated in the Review Decision will not "*fail to respect the discretion that has been granted to the Prosecutor in the context of article 53*".⁶⁴

b. Power of the Chamber to review the Prosecutor's Decision on New Evidence

55. The Principal Counsel agrees with the Comoros that the Chamber has the power to review the Prosecutor's application of articles 17 and 53 of the Statute when she reconsiders her initial decision on the basis of new evidence and facts.⁶⁵

56. The Prosecutor received new evidence⁶⁶ and further victims' applications⁶⁷ after the issuance of the Review Decision. The Prosecutor concedes that for this new information received after her initial decision, she has reached a separate and new

⁶¹ See the Review Decision, *supra* note 6, para. 10 (emphasis added).

⁶² See the Review Decision Appeal Judgment, *supra* note 8, paras. 58-59 and 64.

⁶³ See BERGSMO, M. and KRUGER, P. "Article 53: Initiation of an investigation", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck *et al.*, 2nd ed., 2008), p. 1065, at p. 1075, quoted with approval by the Appeals Chamber in the Review Decision Appeal Judgment, *supra* note 8, para. 59, footnote 134.

⁶⁴ See the Review Decision Appeal Judgment, *supra* note 8, para. 60.

⁶⁵ See the Request for Review, *supra* note 2, para. 11.

⁶⁶ *Idem*, paras. 15-16 and 19.

⁶⁷ *Ibid.*, paras. 17-18.

conclusion.⁶⁸ Accordingly, the Principal Counsel agrees with the Comoros that this new decision can be subject to review by the Chamber under article 53(3)(a) of the Statute.

57. In this regard, the Principal Counsel limits her observations to the new evidence related to the victims she represents and transmitted to the Prosecutor on 4 October 2016.⁶⁹ At the outset, the Principal Counsel notes that for the purpose of the new assessment, the Prosecutor decided not to take into account 66 out of the 78 applications transmitted without providing further explanation – other than the temporary redaction of the victims' identifying information.⁷⁰ Among the twelve victims to which the Prosecutor assigned a pseudonym, only eight are actually cited in the Prosecutor's Decision on New Evidence.

58. Furthermore, the Prosecutor systematically disregarded and misread the few applications she refers to. In particular, the Principal Counsel notes that the Prosecutor supports her findings regarding the "*limited access*" to the toilets, *inter alia*, on the accounts of Victims W4 and W15⁷¹ – who instead indicated that there was no access at all – and of Victim W21, who does not mention the issue in her application. Conversely, Victim W19 and Victim O8 indicate that no access at all was given to the toilets and they are both not cited in the Prosecutor's Decision on New Evidence.

59. By the same token, the Prosecutor supports her findings on the "*limited access*" to water and food, *inter alia*, on the accounts of Victim W19 – who however indicates that no food and no water at all were provided during the travelling to Ashdod – and of Victim W4, who also indicates that they were not allowed to drink anything.⁷²

⁶⁸ See the Prosecutor's Decision on New Evidence, *supra* note 20, para. 177.

⁶⁹ See the Annex E to the Prosecutor's Decision on New Evidence, *supra* note 20, para. 19.

⁷⁰ See Annex 1.

⁷¹ See the Prosecutor's Decision on New Evidence, *supra* note 20, para. 202, first bullet point.

⁷² *Idem*, para. 202, second bullet point.

Victim O8 and Victim O3 are not cited despite the fact that in their applications they clearly indicate that no food and no water were provided.

60. Similarly, in relation to the “criticism” on the conditions of detention on Israeli territory, the Prosecutor does not cite Victim W21, whose account is consistent with the one of Victims W4, W8 and W15 and relates to both deprivation of sleep and continuous harassment while detained – which, in any case, amount to more than simply, or unspecific, criticism towards the general conditions of detention.⁷³

61. Lastly, the Prosecutor repeatedly attempts to cast doubts on the genuine character and reliability of the information provided by the victims by (i) pointing at similarities among the applications as they were filled in by the same person;⁷⁴ and (ii) emphasizing a series of “*honest mistakes*”⁷⁵ and cultural biased “*misunderstandings or disagreements*”⁷⁶ that would allegedly affect the views of the victims when recollecting the events they suffered from.⁷⁷

62. In relation to point (i), the Principal Counsel recalls that the relevant jurisprudence of the Court consistently establishes that repetitive descriptions across several applications do not, *per se*, affect the credibility of the victims⁷⁸ as it is understandable that similar language and expressions would appear in those applications for which the same intermediary has helped to complete, or in which the victims describe the same events or their experiences as quite similar.⁷⁹

⁷³ *Ibidem*, paras. 215 and 216.

⁷⁴ *Ibid.*, paras. 182-187.

⁷⁵ *Ibid.*, paras. 267-269.

⁷⁶ *Ibid.*, paras. 104 and 208.

⁷⁷ See also the Prosecutor’s Reconsideration Decision, *supra* note 19, paras. 104 and 110-111.

⁷⁸ See the “Decision on the 138 applications for victims’ participation in the proceedings” (Pre-Trial Chamber, Single Judge), No. ICC-01/04-01/10-351, 11 August 2011, para. 30; and the “Redacted version of the Decision on the applications by 7 victims to participate in the proceedings” (Trial Chamber I), No. ICC-01/04-01/06-2764-Red, 25 July 2011, para. 25.

⁷⁹ *Idem*. See also the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in

63. As regards point (ii) on the alleged victims' misappreciation of the events, the Principal Counsel submits that the Prosecutor's arguments are purely speculative and rest on a mere attempt to undermine information which would conflict with her assessment of the events – in particular, in relation to the crucial findings on the existence of live fire prior to the boarding of the *Mavi Marmara*⁸⁰ and the commission of the crime of torture.⁸¹

2. The Prosecutor has failed to comply with the Review Decision

64. The Prosecutor indicates in her Final Decision her intention to address “whether the reasoning in the Request discloses a well founded basis to reach a different conclusion than that contained in the Report”.⁸² After doing so, the Prosecutor reaffirms her original Decision Not to Investigate on the basis of (i) the potential perpetrators of the crimes,⁸³ (ii) the scale of the crimes,⁸⁴ (iii) the nature of the crimes,⁸⁵ (iv) the manner of commission of the crimes,⁸⁶ and (v) the impact of the crimes.⁸⁷

65. The Principal Counsel agrees with the Comoros that in doing so the Prosecutor ignores, misunderstands or deliberately disregards the factors identified by the Chamber as relevant to the determination of gravity under article 17(1)(d) of

the Related Proceedings” (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-01/11-249, 5 August 2011, paras. 31-36.

⁸⁰ See the Prosecutor's Decision on New Evidence, *supra* note 20, paras. 267-269 and 277-278.

⁸¹ *Idem*, paras. 295 and 298.

⁸² See the Prosecutor's Final Decision, *supra* note 9, para. 8.

⁸³ See the “Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute”, No. ICC-01/13-14-Conf, 30 March 2015, para. 62.

⁸⁴ See the Decision Not to Investigate, *supra* note 4, paras. 138 and 142.

⁸⁵ *Idem*, para. 139.

⁸⁶ *Ibidem.*, para. 140.

⁸⁷ *Ibid.*, paras. 141-142.

the Statute.⁸⁸ As a consequence, the same errors identified by the Chamber in the Review Decision are repeated in the Prosecutor's Final Decision.

66. As the Comoros points out,⁸⁹ this decision is all the more concerning because the allegations in this situation appear of equal magnitude to other cases for which the Prosecutor has decided they do warrant her attention.

67. The Principal Counsel argues that, had the Prosecutor applied the legal requirements as provided by the Chamber to each of the five aspects described below, she could only have reasonably concluded that the gravity criterion for the purposes of article 53(1)(b) is met.

a. Consideration with respect to the potential perpetrators of the crimes

68. The Prosecutor disregards the requirement given by the Chamber with respect to the potential perpetrators of the crimes and misunderstands its impact on the gravity assessment of the potential cases arising therefrom.⁹⁰

69. While the Prosecutor acknowledges that "*the Report did not expressly state a conclusion on this question*",⁹¹ she fails once again to apply the requirement in her assessment and with no further explanation concludes that an investigation could "*at least include any direct physical perpetrators*".⁹²

⁸⁸ See the Review Decision, *supra* note 6, paras. 23, 26, 30, 45, 47 and 49; and the Request for Review, *supra* note 2, paras. 5, 65, 73, 77, 80 and 100.

⁸⁹ See the Request for Review, *supra* note 2, para. 6.

⁹⁰ Cf. the Review Decision, *supra* note 6, paras. 22-24; and the Prosecutor's Reconsideration Decision, *supra* note 19, paras. 166-168.

⁹¹ See the Prosecutor's Reconsideration Decision, *supra* note 19, para. 166.

⁹² *Idem*, para. 167.

70. In reaching this conclusion, the Prosecutor further misunderstands the relevant requirement. Indeed, she accepts that an investigation would be likely to lead to the prosecution of those persons who may bear the greatest responsibility for the identified crimes committed during the seizure of the *Mavi Marmara* by the IDF, but fails to draw the appropriate consequences. As indicated by the Chamber,⁹³ this factor is not to be considered in isolation but together with the other requirements that were provided in the Review Decision.

71. The Principal Counsel stresses that none of the five factors taken separately could alone outweigh the initial overall assessment of gravity as conducted by the Prosecutor. Instead, each of those requirements complements – and therefore needs to be taken into consideration together with – the others that were provided by the Chamber. As it is shown below,⁹⁴ the Prosecutor seems to purposely ignore the cumulative significance of her failure to apply each and every requirement provided by the Chamber when evaluating gravity. Had the Prosecutor applied the legal requirements provided by the Chamber with respect to the potential perpetrators of the crimes together with all the other four factors – i.e. nature, manner of commission, scale and impact of the crimes – she could only have reasonably concluded that the gravity criterion for the purposes of article 53(1)(b) is met.

b. Nature of the crimes

72. The Prosecutor refuses to adopt the applicable standard provided by the Chamber in assessing the nature of the crimes for the purposes of article 53(1)(b). In so doing, the Prosecutor confounds the concept of the gravity of the case with the gravity of the crimes and further justifies her approach by referring to her previous submissions on the absence of hierarchy of crimes in the Statute.

⁹³ See the Review Decision, *supra* note 6, para. 24.

⁹⁴ See *infra* paras. 72-87.

73. The Principal Counsel acknowledges that the nature of the crimes is only one among the other factors that have to be taken into account when assessing the gravity of a potential case under article 53(1)(b) and that, in this sense, the gravity of the crimes would not always lead to the conclusion that a potential case arising from the situation is grave enough to open an investigation (i.e. the gravity of the underlying crimes does not always overlap with the gravity of the case). However, the Prosecutor improperly reiterates her previous submissions regarding the absence of a hierarchy of crimes in the Statute.⁹⁵ Indeed, while it would certainly be inapposite to look for such a hierarchy while assessing the jurisdiction of the Court under article 53(1)(a), it is utterly unreasonable to refuse to conclude that certain crimes are intrinsically more grave than others and, therefore, bear a greater weight when assessing the gravity of the relevant potential cases under article 53(1)(b) of the Statute.

74. Contrary to the Prosecutor's submissions, giving a different weight to different crimes when assessing the overall gravity of a potential case arising from the situation is only logical as it is not the crimes taken in isolation that would result "*more worthy of investigation and prosecution*",⁹⁶ but the case itself with all its other components assessed – e.g. the manner and the impact of the crimes on the victims, the alleged perpetrators, etc.

75. Moreover, as regards the Prosecutor's arguments on the "*neutral significance*" of the legal characterisation of the relevant conducts in her gravity assessment, the Principal Counsel recalls that (i) it is indeed the Chamber that has the ultimate authority to reassess the legal characterisation as it did in the Request for Review; and (ii) further investigation on complex conducts may be reasonably needed in

⁹⁵ See the Prosecutor's Final Decision, *supra* note 9, paras. 83, 86 (footnote 148) and 164.

⁹⁶ *Idem*, para. 86, footnote 148.

order to establishing the commission of different crimes grounded on common legal elements.

76. In the case at hand, had the Prosecutor adopted the required standard as illustrated by the Chamber, she could only have reasonably concluded that (i) in the alternative to the war crime of outrages upon personal dignity under article 8(2)(a)(ii) of the Statute, there is also a reasonable basis to believe that the war crime of torture or inhuman treatment under article 8(2)(a)(ii) was committed; and (ii) this finding has a substantial impact on the gravity assessment of the overall potential cases arising from the situation.

c. Manner of commission of the crimes

77. Regarding the use of live fire by the IDF prior to boarding, the Prosecutor disregards the Chamber's conclusions that she should have looked not only at the statements coming from the victims, but also at the autopsies and the UN report findings on this specific issue. Instead, once again the Prosecutor keeps on referring to the possible honest mistakes on the victims' side and the possible purely warning nature of the shots suggested in the Turkel Report.⁹⁷

78. Moreover, the Prosecutor does not consider the Chamber's finding that live fire prior to boarding may reasonably suggest that there was an IDF prior intention to attack and possibly kill the passengers.⁹⁸ Had the Prosecutor taken into account all the available information as required by the Chamber, she could only have concluded that there is a reasonable basis to believe that (i) live fire was possibly used prior to boarding; and (ii) the use of live fire prior to boarding reasonably

⁹⁷ See the Prosecutor's Reconsideration Decision, *supra* note 19, paras. 103-104 and 115-119.

⁹⁸ *Idem*, paras. 104-126. Cf. the Review Decision, *supra* note 6, paras. 33-36.

suggests a prior intention to attack and kill passengers, and as such it is a clear indicator of sufficient gravity of the potential cases arising from the situation.

79. Regarding the cruel and abusive treatment of detained passengers in Israel, the Prosecutor deliberately ignores the Chamber's findings in this regard and its impact on the gravity assessment. The Prosecution simply states that the treatment of detained passengers once they arrived in Israeli territory "*cannot be reasonably considered as relevant to the question whether the identified crimes were committed according to a plan or policy*".⁹⁹ Based on these premises, the Prosecutor admittedly refuses to conduct any substantive analysis of the relevant allegations,¹⁰⁰ as requested by the Chamber.

80. Indeed, while the Prosecutor acknowledges that the "*information suggesting further mistreatment of some detainees once they arrived in Israeli territory is concerning*",¹⁰¹ she deliberately fails – once again – to take a position on whether similar abuses were committed by servants of the Israeli government against the same persons on both the vessels and in Israel. By doing so, the Prosecutor bluntly decides not to consider the Chamber's request to take into account in her assessment a pattern of similar conduct in order to establish a relevant plan or policy in the commission of the relevant crimes and thus their inherent gravity.

81. The Prosecutor further misunderstands the Chamber's conclusions and relevant directions on the "*unnecessarily*" cruel treatment of passengers during the taking of the *Mavi Marmara* and the IDF attempts to conceal the crimes.¹⁰² Indeed, the Chamber indicated that the apparent cruelty and the attempts to cover up the crimes could be also reasonably explained as being the necessary conduct to successfully

⁹⁹ See Prosecutor's Reconsideration Decision, *supra* note 19, para. 145.

¹⁰⁰ *Idem*.

¹⁰¹ See the Decision Not to Investigate, *supra* note 4, para. 88.

¹⁰² See the Prosecutor's Reconsideration Decision, *supra* note 19, paras. 148-154.

carry out the criminal plan or policy.¹⁰³ Therefore, being *compatible* with the plan in the sense of being elements of the plan itself and not, as the Prosecutor suggests, simply incidental or merely contemporaneous to the implementation of such a plan or policy.

82. Furthermore, contrary to the Prosecutor's arguments,¹⁰⁴ the Chamber never suggested that her conclusion that there was no reasonable basis to believe that the identified crimes were committed according to a plan or policy was the only factor underpinning its gravity assessment. On the contrary, it stems from the analysis conducted by the Chamber that the Prosecutor relied on the absence of such a plan or policy to further support her view that the gravity requirement was not met.¹⁰⁵ In this sense, it is clear that the Prosecutor's assessment of gravity cannot be based on one element or circumstance taken in isolation.

83. However, the Prosecutor's circular strategy of downplaying each of the single findings of the Chamber in relation to (i) the circumstances of the interception and boarding operation itself; (ii) the manner in which the boarding operation was conducted;¹⁰⁶ and (iii) the commission of crimes on the other vessels of the flotilla¹⁰⁷ results in nullifying the cumulative significance of those elements when assessing the existence of a plan or policy and the gravity itself.

84. Consequently, had the Prosecutor considered the Chamber's reasonable alternative explanation for the cruelty and the attempt to conceal the crimes together

¹⁰³ See the Review Decision, *supra* note 6, paras. 40-41. *Cf.* the Prosecutor's Reconsideration Decision, *supra* note 19, para. 151.

¹⁰⁴ See the Prosecutor's Reconsideration Decision, *supra* note 19, para. 153.

¹⁰⁵ See the Review Decision, *supra* note 6, para. 40.

¹⁰⁶ See the Prosecutor's Reconsideration Decision, *supra* note 19, para. 153, indicating these considerations as part of the elements the Prosecution took into account when assessing the existence of a plan or a policy. See the Review Decision, *supra* note 6, paras. 33-38.

¹⁰⁷ See the Review Decision, *supra* note 6, paras. 42-43. *Cf.* the Prosecutor's Reconsideration Decision, *supra* note 19, paras. 155-159.

with the Chamber's findings on (i) the cruel and abusive treatment of detained passengers in Israel; and (ii) the use of live fire by the IDF prior to boarding, she could only have reasonably concluded that there were all strong indicators of both a plan or policy and sufficient gravity.

d. Scale of the crimes and impact of the crimes

85. In her Final Decision, the Prosecutor explicitly decides to disregard the Chamber's findings on the relevance of the impact of the crimes (i) on the victims and their families, (ii) on the population of Gaza, and (iii) on the international community as a further indicator of sufficient gravity.¹⁰⁸ On the contrary, the Prosecutor (i) plainly reiterates her views on the "*relatively small*" number of victims affected by the crimes,¹⁰⁹ (ii) stresses the fact that the Gaza population received the supplies carried by the vessels and as such did not suffer from the events,¹¹⁰ and (iii) confounds the concept of subjective "*social alarm*"¹¹¹ with the objective concern of the international community caused by the events – which, as indicated by the Chamber, "*inter alia, resulted in several fact-finding missions, including by the UN Human Rights Council and the UN Secretary General*".¹¹²

86. Accordingly, the Prosecutor also misunderstands the Chamber's reference to the cases against Bahar Idriss Abu Garda and Abdallah Banda.¹¹³ Once again the Prosecutor takes into account in isolation the Chamber's assessment on the scale of the crimes and fails to weight it together with their impact on direct and indirect victims, including the impact on the international community. Moreover, while it is

¹⁰⁸ See the Review Decision, *supra* note 6, paras. 47-48.

¹⁰⁹ See the Prosecutor's Reconsideration Decision, *supra* note 19, para. 131.

¹¹⁰ *Idem*, para. 132.

¹¹¹ *Ibidem*, para. 133.

¹¹² See the Review Decision, *supra* note 6, para. 48.

¹¹³ See the Prosecutor's Reconsideration Decision, *supra* note 19, paras. 74-80 and the Review Decision, *supra* note 6, para. 26.

evident that the number of killings in the two mentioned cases is almost identical to the ones that took place on the *Mavi Marmara*, the Prosecutor fails to attach any relevance to the fifty persons wounded and to the hundreds possibly tortured – which offsets any consideration based on the *specific quality* of the concerned victims in the Abu Garda and Banda cases.¹¹⁴

87. Had the Prosecutor correctly considered these elements in her assessment as instructed by the Chamber, she could only have reasonably concluded that the scale and the impact of the crimes in the specific circumstances are further indicators of sufficient gravity of the potential cases arising from the situation.

3. The errors in the Prosecutor's Final Decision should be remedied

88. The Principal Counsel has argued in the past that the right to appeal a decision cannot be implicit, but must be explicitly provided for in the legal texts of the Court.¹¹⁵ However, said submission concerned decisions issued by the Chamber, not by the Prosecutor. Accordingly, the fact that no provision *expressly* provides for a judicial review of the Prosecutor's Final Decision does not prevent the Chamber that requested the Prosecutor to reconsider the Decision Not to Investigate from providing a remedy for the Prosecutor's lack of compliance with said request.

89. In fact, the possible result of the judicial review of the Prosecutor's Final Decision is that (i) said decision remains valid because it complies with the Review Decision and, as a consequence, no investigation is opened; or that (ii) said decision is null and void because it has been adopted in violation of the Review Decision. In the latter scenario, pursuant to article 53(1) of the Statute, the Prosecutor will be

¹¹⁴ See the Prosecutor's Reconsideration Decision, *supra* note 19, para. 78.

¹¹⁵ See the "Victims' observations on the admissibility of the Prosecution 'Notice of Appeal of 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation' (ICC-01/13-34)'" , No. ICC-01/13-48 OA, 19 August 2015, para. 15.

obliged to issue a new decision on the State referral which complies with the Review Decision.

90. The Principal Counsel observes that the Prosecutor's reviewed decision may still reach the same conclusion as the Final Decision, e.g. not to open an investigation. In any event, however, the Prosecutor remains obliged to consider and apply the legal criteria provided by the Chamber in the Review Decision and may not simply replicate her analysis previously submitted to the Chamber. Otherwise, the Review Decision would lose its judicial character *vis-à-vis* the Prosecutor and would thereby be contrary to the Statute.

91. As argued in section IV.2 above, the Prosecutor has failed to comply with the Review Decision. The Principal Counsel submits that the necessary consequence of said failure to abide by the Review Decision is the nullity of the Prosecutor's Final Decision.

92. The Prosecutor, like any other participant in the proceedings, is bound by the decisions and orders issued by the Chamber and cannot simply ignore them. As put by the Appeals Chamber, "[n]o criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations".¹¹⁶

93. In turn, judges have the power to ensure that their decisions are respected by issuing new orders and/or declaring null and void the contravening actions by the

¹¹⁶ See the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU'" (Appeals Chamber), No. ICC-01/04-01/06-2582 OA18, 8 October 2010, para. 48.

participants. In particular, Chambers of this Court have envisaged these remedies when the Prosecutor has failed to comply with her legal obligations.¹¹⁷

94. Moreover, the Prosecutor's erroneous conclusions on the lack of gravity of the situation, resulting from the application of standards inconsistent with the legal findings of the Review Decision, must be replaced with the conclusions reached by the Chamber pursuant to the correct legal standards.

95. The Principal Counsel submits that the abovementioned remedy is appropriate in the current situation due to the Prosecutor's failure to apply the gravity requirements as identified in the Review Decision to the arguments raised in the litigation that followed the Review Decision. The conclusions adopted by the Prosecutor are in complete disregard of the legal findings reached by the Chamber and are necessarily legally incorrect.

96. As the Chamber has clarified, *"the Prosecutor has discretion to open an investigation but, as mandated by article 53(1) of the Statute, that discretion expresses itself only in paragraph (c), i.e. in the Prosecutor's evaluation of whether the opening of an investigation would not serve the interests of justice. Conversely, paragraphs (a) and (b) require the application of exacting legal requirements"*.¹¹⁸ Had the Prosecutor applied the legal requirements as elaborated by the Chamber instead of merely disagreeing with those, she could only have reasonably concluded that the gravity criterion is met.

¹¹⁷ *Idem*, para. 58. See also the "Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing" (Pre-Trial Chamber I), No. ICC-01/04-01/07-621, 20 June 2008, para. 63 (*"the Chamber, as the ultimate guarantor of the fairness of the proceedings and the rights of the suspects, may engage in a proprio motu analysis of the legality of such agreements [concluded by the Prosecutor not to disclose documents under article 54(3)(e) of the Rome Statute]. If all or part of such agreements are found to be contrary to the statutory framework provided for by the Statute and the Rules, some of their confidentiality clauses may be declared null and void"*).

¹¹⁸ See the Review Decision, *supra* note 6, para. 14 (emphasis added).

97. As a consequence, since the requirements of article 53(1)(a) and (b) are met in the present circumstances, taking into account the interests of the victims and the Prosecutor's discretion, any decision not to initiate an investigation could only have been taken under article 53(1)(c) of the Statute – requiring the Prosecutor to show that there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

98. In this regard, the Principal Counsel notes with concern that the Prosecutor, assuming *arguendo* that some of the legal standards set by the Chamber were applicable, already advanced some *hypothetical* conclusions reaffirming her Decision Not to Investigate.¹¹⁹ Therefore, she stresses that, should the Prosecutor be requested to further revisit her conclusions, she must objectively apply the legal standards clarified by the Chamber, without any presumption that she will reach the same conclusions as the ones in her Decision Not to Investigate.

99. Finally, the Principal Counsel informs the Chamber that in the course of her consultations with the victims, they unanimously expressed concern for the way in which the Prosecutor misapprehends the facts and what they suffered from. In this regard, the victims' reactions to the findings made by the Prosecutor in her Final Decision revealed again mixed feelings of anger, disbelief and fear at the prospect that they may be abandoned by the Court.

100. In particular, the victims questioned the Prosecutor's lack of understanding of the gravity and impact of the events, which they describe as "massive". In this regard, the Principal Counsel recalls her previously filed submissions as still valid

¹¹⁹ See the Prosecutor's Final Decision, *supra* note 9, para. 34.

today since the victims have reiterated all their concerns already presented to the Chamber at the time of the filing of observations on the First Request for Review.¹²⁰

101. Moreover, the victims questioned the Prosecutor's evaluation of the further evidence provided to her and expressed their concern that, despite all material provided, there is a clear unwillingness on the side of the Prosecutor to not genuinely consider said material.

102. The victims therefore request that the Chamber takes into account their interests to obtain justice and to know the truth in assessing the Comoros' Request for Review.

¹²⁰ See the "Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation", No. ICC-01/13-27-Conf, 22 June 2015, paras. 154-163.

V. Conclusion

103. For the foregoing reasons, the Principal Counsel respectfully submits that the Chamber retains jurisdiction over the matter and as such, requests the Chamber to grant the Comoros' application to review the Prosecutor's Final Decision. The Principal Counsel further respectfully requests the Chamber to declare null and void the Prosecutor's Final Decision, issued in violation of the Review Decision; to find that the legal requirements of gravity are met; and thus, to direct the Prosecutor to reconsider her Decision in light of the interests of justice pursuant to article 53(1)(c) of the Rome Statute.



Paolina Massidda
Principal Counsel

Dated this 29th day of March 2018

At The Hague, The Netherlands