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**No. ICC-01/13
Date: 16 September 2020**

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**

Public

**Decision on the ‘Application for Judicial Review by the Government of the
Comoros’**

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Rodney Dixon
Haydee Dijkstal

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

Paolina Massidda
Anne Grabowski

**The Office of Public Counsel for the
Defence**

States Representatives

Rodney Dixon
Haydee Dijkstal

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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PRE-TRIAL CHAMBER I of the International Criminal Court issues this Decision on the ‘Application for Judicial Review by the Government of the Comoros’.

I. Procedural history

1. On 14 May 2013, the Union of the Comoros (the ‘Comoros’) referred the situation concerning ‘the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for [the] Gaza strip’ to the Prosecutor and requested her to initiate an investigation.¹

2. On 6 November 2014, the Prosecutor determined that there was a reasonable basis to believe that the war crimes of wilful killing, wilfully causing serious injury and outrages upon personal dignity had been committed on 31 May 2010 by soldiers of the Israeli Defence Forces (the ‘IDF’), in the context of the interception and takeover of one of the vessels of the flotilla, the *Mavi Marmara*. Nonetheless, the Prosecutor assessed that the potential case(s) arising from the situation would not be of sufficient gravity to justify further action by the Court, within the meaning of article 17(1)(d) of the Rome Statute (the ‘Statute’), and decided not to initiate an investigation (the ‘2014 Decision not to Investigate’).²

3. At the request of the Comoros,³ the Chamber, in its previous composition, reviewed the 2014 Decision not to Investigate pursuant to article 53(3)(a) of the Statute and, on 16 July 2015, rendered the ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’ (the ‘Reconsideration Decision’). The Chamber found that the Prosecutor had committed a series of errors and requested her to reconsider the 2014 Decision not to Investigate in accordance with the Chamber’s directions.⁴

¹ Letter of Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation, ICC-01/13-1-Anx1, annexed as Annex 1 to Presidency, [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](#), 5 July 2013, ICC-01/13-1.

² [Article 53\(1\) Report](#), 6 November 2014, ICC-01/13-6-AnxA, paras 3, 149-151, annexed as Annex A to [Notice of filing the report prepared by the Office of the Prosecutor pursuant to article 53\(1\) of the Rome Statute](#), 4 February 2015, ICC-01/13-6.

³ [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](#), 29 January 2015, ICC-01/13-3-Red.

⁴ [ICC-01/13-34](#), paras 49-50.

4. On 29 November 2017, the Prosecutor filed her decision following reconsideration, whereby she maintained her determination that there was ‘no reasonable basis to conclude that any of the potential cases arising from the situation would be of sufficient gravity to be admissible before the Court’ (the ‘2017 Decision not to Investigate’).⁵

5. At the request of the Comoros,⁶ the Chamber reviewed the 2017 Decision not to Investigate and, on 15 November 2018, rendered its ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’. The Chamber found that the 2017 Decision not to Investigate had not been ‘the result of a proper exercise of reconsideration’, as the Prosecutor had ‘manifestly disregarded’ the Reconsideration Decision. The Chamber set aside the 2017 Decision not to Investigate and requested the Prosecutor to reconsider the 2014 Decision not to Investigate again, in accordance with the Reconsideration Decision.⁷

6. On 2 September 2019, the Appeals Chamber rendered the ‘Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros”’ (the ‘Appeals Chamber’s Judgment’ or the ‘Judgment’). The Appeals Chamber (i) held that a number of directions given by the Chamber to the Prosecutor in the Reconsideration Decision had been inappropriate, (ii) directed the Prosecutor to reconsider the 2014 Decision not to Investigate in accordance with the Reconsideration Decision *and* the Appeals Chamber’s Judgment, and (iii) determined that the pre-trial chamber had the power to review a decision of the Prosecutor following reconsideration.⁸

7. On 2 December 2019, the Prosecutor filed her decision following reconsideration, whereby she maintained the view that no potential case arising from

⁵ [Final decision of the Prosecution concerning the “Article 53\(1\) Report” \(ICC-01/13-6-AnxA\), dated 6 November 2014](#), ICC-01/13-57-Anx1, para. 332, annexed as Annex 1 to [Notice of Prosecutor’s Final Decision under Rule 108\(3\)](#), 29 November 2017, ICC-01/13-57.

⁶ [Application for Judicial Review by the Government of the Union of the Comoros](#), 23 February 2018, ICC-01/13-58-Red.

⁷ [ICC-01/13-68](#), paras 115, 117, p. 45.

⁸ [ICC-01/13-98](#), paras 1-2.

the situation would be sufficiently grave to justify further action by the Court (the ‘2019 Decision not to Investigate’).⁹

8. On 2 March 2020, the Comoros filed the ‘Application for Judicial Review by the Government of the Comoros’ (the ‘Application for Judicial Review’), triggering the present proceedings.¹⁰ The Comoros submits that the Prosecutor has not addressed and corrected the errors identified by the Chamber in the Reconsideration Decision and requests the Chamber, pursuant to article 53(3)(a) of the Statute, to review the 2019 Decision not to Investigate and to order the Prosecutor to reconsider her decision again.¹¹

9. On 4 May 2020, the Chamber received the Victims’ responses to the Application for Judicial Review.¹²

10. On 11 May 2020, the Chamber received the Prosecutor’s response.¹³

11. On 26 May 2020, the Comoros filed its reply to the Prosecutor’s and the Victims’ responses.¹⁴

II. Scope of the present proceedings

12. In the present proceedings, the Chamber is called upon to review the Prosecutor’s 2019 Decision not to Investigate, pursuant article 53(3)(a) of the Statute, in order to determine whether the Prosecutor properly reconsidered her 2014 Decision not to Investigate, in accordance with the Reconsideration Decision. In this regard, the Chamber recalls that the Appeals Chamber found that a number of directions

⁹ [Final decision of the Prosecutor concerning the “Article 53\(1\) Report” \(ICC-01/13-6-AnxA\) dated 6 November 2014](#), ICC-01/13-99-Anx1, paras 4, 97, annexed as Annex 1 to [Notice of Prosecutor’s Final Decision under rule 108\(3\), as revised and refiled in accordance with the Pre-Trial Chamber’s request of 15 November 2018 and the Appeals Chamber’s judgment of 2 September 2019](#), 2 December 2019, ICC-01/13-99.

¹⁰ [ICC-01/13-100](#).

¹¹ [Application for Judicial Review](#), ICC-01/13-100, paras 3, 5, 130.

¹² Office of Public Counsel for Victims, [Victims’ Response to the “Application for Judicial Review by the Government of the Comoros” of 2 March 2020](#), ICC-01/13-107 (the ‘OPCV Response’); Legal Representatives of Victims, [Response of the Victims to the “Application for Judicial Review by the Government of the Comoros” of 2 March 2020](#), ICC-01/13-108 (the ‘LRVs Response’).

¹³ [Prosecution’s Consolidated Response to the Third “Application for Judicial Review by the Government of the Comoros” \(ICC-01/13-100\), and the Observations of Victims \(ICC-01/13-107 and ICC-01/13-108\)](#), ICC-01/13-109 (the ‘Prosecutor’s Response’).

¹⁴ [Reply of the Government of the Comoros to the Responses of the Prosecutor and Victims on the Application of the Comoros for Judicial Review](#), ICC-01/13-110 (the ‘Comoros Reply’).

contained in the Reconsideration Decision exceeded the scope of the Chamber's powers and were therefore inappropriate.¹⁵ As a result, the Chamber will determine whether the Prosecutor carried out her reconsideration in accordance with the Chamber's directions only to the extent that such directions were not considered by the Appeals Chamber to have been inappropriate.

III. Applicable law

13. The Chamber notes articles 17(1)(d), 53(1) and 53(3)(a) of the Statute and rule 108 of the Rules of Procedure and Evidence (the 'Rules'). The Chamber finds it appropriate to set out below the legal framework which will guide its assessment, with regard to: (i) the scope of article 53(1) of the Statute, which governs the procedure for the Prosecutor to initiate an investigation; (ii) the 'reasonable basis to believe' standard in article 53(1) of the Statute, which applies to the Prosecutor's evaluation of the available information; (iii) the gravity requirement under article 17(1)(d) of the Statute, which forms part of the Prosecutor's assessment under article 53(1)(b) of the Statute; and (iv) the scope of the Chamber's power under article 53(3)(a) of the Statute to review a decision of the Prosecutor not to initiate an investigation and to request reconsideration.

A. Scope of article 53(1) of the Statute

14. Article 53(1) of the Statute provides that 'the Prosecutor *shall* [...] initiate an investigation' unless she determines that there is no reasonable basis to proceed.¹⁶ In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) [There is] a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

¹⁵ [Appeals Chamber's Judgment](#), ICC-01/13-98, paras 91-94.

¹⁶ Emphasis added.

15. While it is for the Prosecutor to ultimately decide whether to initiate an investigation,¹⁷ her decision is governed by article 53(1) of the Statute, which obliges her to consider the requirements set out in sub-paragraphs (a) to (c). As held by the Chamber in the Reconsideration Decision, the conditions set out in sub-paragraphs (a) and (b) are ‘exacting legal requirements’.¹⁸ When met, the Prosecutor is duty bound to open an investigation, unless she determines, pursuant to article 53(1)(c), that such an investigation would not serve the interests of justice. This is evidenced by the use of the word ‘shall’ in the *chapeau* of article 53(1) of the Statute.¹⁹

B. ‘Reasonable basis to believe’ standard

16. The ‘reasonable basis to believe’ standard against which the Prosecutor is required to assess the information made available to her in deciding whether to initiate an investigation is the lowest evidentiary standard provided in the Statute. In order for a finding of fact to satisfy this standard, it must be ‘sensible’ or ‘reasonable’, but it need not be the *only* conclusion supported by the available information. In other words, the available information is not required to either point towards one conclusion, or be conclusive. In the presence of several plausible explanations, the presumption of article 53(1) of the Statute is that the Prosecutor investigates in order to be able to properly assess the facts.²⁰ The Chamber explained in its Reconsideration

¹⁷ [Appeals Chamber’s Judgment](#), ICC-01/13-98, para. 58.

¹⁸ [Reconsideration Decision](#), ICC-01/13-34, para. 14.

¹⁹ [Reconsideration Decision](#), ICC-01/13-34, para. 13.

²⁰ [Reconsideration Decision](#), ICC-01/13-34, para. 13; Pre-Trial Chamber III, *Situation in the Republic of Burundi*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi](#), 25 October 2017, ICC-01/17-9-Red (date of public redacted version, 9 November 2017), para. 30 (‘Burundi Article 15 Decision’); Pre-Trial Chamber I, *Situation in Georgia*, [Decision on the Prosecutor’s request for authorization of an investigation](#), 27 January 2016, ICC-01/15-12, para. 25 (‘Georgia Article 15 Decision’); Pre-Trial Chamber III, *Situation in the Republic of Côte d’Ivoire*, [Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire”](#), 15 November 2011, ICC-02/11-14-Corr, para. 24 (‘Côte d’Ivoire Article 15 Decision’); Pre-Trial Chamber II, *Situation in the Republic of Kenya*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#), 31 March 2010, ICC-01/09-19-Corr, paras 27, 28, 30, 33-35 (‘Kenya Article 15 Decision’). It is worth noting that even in interpreting the ‘reasonable grounds to believe’ standard applicable under article 58 of the Statute for the issuance of a warrant of arrest or summons to appear – a standard higher than the ‘reasonable basis to believe’ standard prescribed by article 53(1)(a) of the Statute – the Appeals Chamber held that the conclusion reached on the facts need not be the *only* reasonable conclusion and that the Prosecutor is not required to disprove other reasonable conclusions that may be supported by the evidence; Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a](#)

Decision that the standard must be understood in the context in which it operates and in light of the object and purpose of article 53(1) of the Statute.²¹ At the pre-investigative stage, the information available to the Prosecutor does not need to be ‘clear, univocal or not contradictory’. Making the commencement of an investigation contingent on the available information being clear, univocal or not contradictory creates a ‘short circuit’. Facts which are difficult to establish or unclear, or the existence of conflicting accounts, call for the opening of an investigation (rather than the opposite), since it is the very purpose of such an investigation to properly assess the facts and provide clarity.²²

C. Gravity requirement

17. The Prosecutor’s 2014 Decision not to Investigate and, as a consequence, the 2019 Decision not to Investigate, are exclusively based on the conclusion that the potential case(s) arising from 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.²³ The Chamber considers it appropriate thus to recall the Court’s jurisprudence on: (i) the relevant criteria for the assessment of gravity, as applied at the situation stage; and (ii) the object and purpose of the gravity requirement.

1. *Relevant criteria in the assessment of gravity*

18. It is established jurisprudence that, at the situation stage, gravity (and admissibility in general) is assessed against the ‘potential cases’ arising from the situation, which are defined by two parameters: (i) the groups of persons likely to be the object of the investigation; and (ii) the crimes within the jurisdiction of the Court

[Warrant of Arrest against Omar Hassan Ahmad Al Bashir](#)”, 3 February 2010, ICC-02/05-01/09-73, para. 33.

²¹ See similarly [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 32.

²² [Reconsideration Decision](#), ICC-01/13-34, para. 13; see also [Burundi Article 15 Decision](#), ICC-01/17-9-Red, paras 30, 138.

²³ [2014 Decision not to Investigate](#), ICC-01/13-6-AnxA, para. 150; [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 97.

allegedly committed during the incidents that are likely to be the focus of the investigation.²⁴

19. In assessing gravity in relation to the groups of persons likely to be the object of the investigation, the Prosecutor must determine whether the investigation would encompass those who may bear the greatest responsibility for the alleged crimes.²⁵ In its Reconsideration Decision, the Chamber highlighted that this factor ‘relates to the Prosecutor’s ability to investigate and prosecute those being the most responsible for the crimes under consideration’, irrespective of their seniority or hierarchical position.²⁶ In considering the groups of persons likely to be the object of the investigation, the Prosecutor’s assessment ‘should be general in nature and compatible with the pre-investigative stage’.²⁷ The parameters defining the potential cases may change at a later stage, depending on the development of the investigation.²⁸

20. In assessing gravity in relation to the crimes allegedly committed, the Prosecutor must consider both quantitative and qualitative criteria, which relate to four main factors established in the jurisprudence of the Court, as set out below.²⁹ The following criteria have so far been taken into account by Chambers of this Court:

²⁴ [Reconsideration Decision](#), ICC-01/13-34, para. 21; [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 143; [Georgia Article 15 Decision](#), ICC-01/15-12, paras 36-37; [Côte d’Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, paras 190-191, 204; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, paras 50, 58-59, 61.

²⁵ [Burundi Article 15 Decision](#), ICC-01/17-9-Red, paras 184, 187; [Georgia Article 15 Decision](#), ICC-01/15-12, para. 51; [Côte d’Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, paras 203-204; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, paras 60, 188.

²⁶ [Reconsideration Decision](#), ICC-01/13-34, para. 23.

²⁷ [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 60; *see also* [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 184; [Georgia Article 15 Decision](#), ICC-01/15-12, para. 51; [Côte d’Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, paras 203-204.

²⁸ [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 50.

²⁹ Appeals Chamber, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense’](#), 19 February 2020, ICC-01/12-01/18-601-Red, paras 2, 92-94, 127(iii) (‘Al Hassan Admissibility Judgment’); Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the Admissibility Challenge raised by the Defence for Insufficient Gravity of the Case](#), 27 September 2019, ICC-01/12-01/18-459-tENG, para. 47 (‘Al Hassan Admissibility Decision’); [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 184; [Georgia Article 15 Decision](#), ICC-01/15-12, para. 51; [Reconsideration Decision](#), ICC-01/13-34, para. 21; Pre-Trial Chamber I, *The Prosecutor v. Charles Blé Goudé*, [Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity](#), 12 November 2014, ICC-02/11-02/11-185,

- a. **scale of the alleged crimes:** number of victims,³⁰ geographical area affected,³¹ span and intensity of the alleged crimes over time;³²
- b. **nature of the alleged crimes:** legal characterisation of the alleged conduct,³³ human rights violated as a result of the alleged crimes;³⁴
- c. **manner of commission of the alleged crimes:** means employed to execute the alleged crimes,³⁵ whether the alleged crimes were committed with particular cruelty or brutality,³⁶ whether they were committed on the basis of discriminatory motives,³⁷ against a victim who is particularly defenceless or vulnerable,³⁸ or pursuant to a plan or policy;³⁹ and

para. 11 ('Blé Goudé Admissibility Decision'); Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 29 January 2012, ICC-01/09-02/11-382-Red, para. 50; [Côte d'Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, para. 204; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 62; Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, [Decision on the Confirmation of Charges](#), 8 February 2010, ICC-02/05-02/09-243-Red, paras 31-32 ('Abu Garda Confirmation of Charges Decision').

³⁰ [Al Hassan Admissibility Judgment](#), ICC-01/12-01/18-601-Red, paras 92, 97, 127(vi); [Al Hassan Admissibility Decision](#), ICC-01/12-01/18-459-tENG, para. 57; [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 188; [Blé Goudé Admissibility Decision](#), ICC-02/11-02/11-185, para. 21; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, paras 62, 190-191, 199; [Abu Garda Confirmation of Charges Decision](#), ICC-02/05-02/09-243-Red, para. 31.

³¹ [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 62; *see also* paras 190-191.

³² [Al Hassan Admissibility Decision](#), ICC-01/12-01/18-459-tENG, para. 57; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 62.

³³ [Reconsideration Decision](#), ICC-01/13-34, para. 28.

³⁴ [Al Hassan Admissibility Judgment](#), paras 92, 122.

³⁵ Derived from rule 145(1)(c) of the Rules; [Blé Goudé Admissibility Decision](#), ICC-02/11-02/11-185, paras 12, 21; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 62; [Abu Garda Confirmation of Charges Decision](#), para. 32.

³⁶ Derived from rule 145(2)(b)(iv) of the Rules; [Al Hassan Admissibility Decision](#), ICC-01/12-01/18-459-tENG, para. 48; [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 188; [Georgia Article 15 Decision](#), ICC-01/15-12, para. 54; [Blé Goudé Admissibility Decision](#), ICC-02/11-02/11-185, paras 12, 21; Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 29 January 2012, ICC-01/09-02/11-382-Red, para. 49; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, paras 193, 199; Pre-Trial Chamber I, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, [Second Warrant of Arrest](#), 4 July 2018, ICC-01/11-01/17-13, paras 31-32.

³⁷ Derived from rule 145(2)(b)(v) of the Rules; [Al Hassan Admissibility Judgment](#), ICC-01/12-01/18-601-Red, para. 92; [Al Hassan Admissibility Decision](#), ICC-01/12-01/18-459-tENG, paras 48, 57; [Blé Goudé Admissibility Decision](#), ICC-02/11-02/11-185, paras 12, 20-21.

³⁸ Derived from rule 145(2)(b)(iii) of the Rules; [Al Hassan Admissibility Decision](#), ICC-01/12-01/18-459-tENG, paras 48, 57; [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 188; [Blé Goudé Admissibility Decision](#), ICC-02/11-02/11-185, paras 12, 21.

³⁹ Derived from articles 7(2)(a) and 8(1) of the Statute; [Côte d'Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, para. 205.

- d. **impact of the alleged crimes:** harm caused to the victims and their families,⁴⁰ extent of the damage caused,⁴¹ impact beyond the direct victims and their families or beyond the immediate damage.⁴²

21. The assessment of gravity involves a holistic evaluation of the above-mentioned factors and criteria.⁴³ Chambers of this Court have consistently held that quantitative criteria alone, such as the number of victims, are not determinative of the gravity of (potential) cases.⁴⁴

2. *Object and purpose of the gravity requirement*

22. The gravity requirement under article 17(1)(d) of the Statute functions as an additional safeguard to the drafters' careful selection of the crimes over which the Court has jurisdiction, in order to prevent the Court from investigating, prosecuting and trying *peripheral* cases.⁴⁵ The Appeals Chamber held that the 'purpose of this requirement is to exclude from the purview of the Court those rather unusual cases when conduct that technically fulfils all the elements of a crime under the Court's jurisdiction is nevertheless of *marginal gravity* only'.⁴⁶ The Appeals Chamber explained that cases which are not of sufficient gravity are limited, as the Court's jurisdiction is restricted already to 'the most serious crimes of international concern'. The crimes subject to the material jurisdiction of the Court are therefore, in principle,

⁴⁰ Derived from rule 145(1)(c) of the Rules; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, paras 62, 195-196; [Abu Garda Confirmation of Charges Decision](#), ICC-02/05-02/09-243-Red, paras 32-33.

⁴¹ Derived from rule 145(1)(c) of the Rules; [Al Hassan Admissibility Judgment](#), paras 93, 124; [Georgia Article 15 Decision](#), ICC-01/15-12, para. 55; [Blé Goudé Admissibility Decision](#), ICC-02/11-02/11-185, para. 12; [Abu Garda Confirmation of Charges Decision](#), ICC-02/05-02/09-243-Red, paras 32-33.

⁴² [Georgia Article 15 Decision](#), ICC-01/15-12, para. 55; [Abu Garda Confirmation of Charges Decision](#), ICC-02/05-02/09-243-Red, para. 33.

⁴³ [Al Hassan Admissibility Judgment](#), ICC-01/12-01/18-601-Red, paras 2, 94, 127(iii).

⁴⁴ [Al Hassan Admissibility Judgment](#), ICC-01/12-01/18-601-Red, paras 2, 92-94, 127(iii); [Al Hassan Admissibility Decision](#), ICC-01/12-01/18-459-tENG, para. 47; [Burundi Article 15 Decision](#), ICC-01/17-9-Red, paras 184, 189; [Blé Goudé Admissibility Decision](#), ICC-02/11-02/11-185, para. 11; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 62; [Abu Garda Confirmation of Charges Decision](#), ICC-02/05-02/09-243-Red, para. 31; *see also* Pre-Trial Chamber I, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, [Second Warrant of Arrest](#), 4 July 2018, ICC-01/11-01/17-13, para. 31.

⁴⁵ [Côte d'Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, para. 201; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 56; [Abu Garda Confirmation of Charges Decision](#), ICC-02/05-02/09-243-Red, para. 30; Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, [Decision on the Prosecutor's Application for Warrants of Arrest, Article 58](#), 10 February 2006, ICC-01/04-520-Anx2, para. 42.

⁴⁶ [Al Hassan Admissibility Judgment](#), ICC-01/12-01/18-601-Red, para. 53 (emphasis added).

of sufficient gravity to justify further action.⁴⁷ The Appeals Chamber also highlighted the ‘exclusionary nature’ of the gravity requirement in that its purpose is not to oblige the Court to choose only the most serious cases, but merely to oblige it not to prosecute cases of marginal gravity.⁴⁸

D. Scope of the Chamber’s powers under article 53(3)(a) of the Statute

23. In its Judgment, the Appeals Chamber set out the scope of the pre-trial chamber’s power to request reconsideration under article 53(3)(a) of the Statute. The Appeals Chamber distinguished among questions of law, questions of fact and questions regarding the factors relevant to the gravity assessment, as follows:

- a. **Questions of law:** the Prosecutor is bound to adopt the pre-trial chamber’s interpretation of the applicable law, both substantive and procedural, including most notably the standard to be applied to the evaluation of the evidence.⁴⁹
- b. **Questions of fact:** the pre-trial chamber may direct the Prosecutor to take into account certain available information, but may not direct her as to how to evaluate the available information, what factual findings to make and how to apply the law to the facts.⁵⁰
- c. **Gravity assessment:** the pre-trial chamber may direct the Prosecutor to take into account certain factors and/or information related thereto, but may not direct her as to what weight to assign to the different factors and what result to reach in the gravity assessment.⁵¹

⁴⁷ [Al Hassan Admissibility Judgment](#), ICC-01/12-01/18-601-Red, paras 55-58.

⁴⁸ [Al Hassan Admissibility Judgment](#), ICC-01/12-01/18-601-Red, para. 59, *confirming* [Al Hassan Admissibility Decision](#), ICC-01/12-01/18-459-tENG, para. 50; *see also* Appeals Chamber, *Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”*, 13 July 2006, ICC-01/04-169, para. 81.

⁴⁹ [Appeals Chamber’s Judgment](#), ICC-01/13-98, paras 78, 82.

⁵⁰ [Appeals Chamber’s Judgment](#), ICC-01/13-98, paras 80, 82.

⁵¹ [Appeals Chamber’s Judgment](#), ICC-01/13-98, paras 81, 82.

- d. **Final decision:** the pre-trial chamber may not direct the Prosecutor as to the result of her reconsideration. The final decision whether to initiate an investigation or not rests with the Prosecutor.⁵²

24. The Appeals Chamber also held that, following a request for reconsideration, the pre-trial chamber retains the power to review whether the Prosecutor has carried out the reconsideration in accordance with the pre-trial chamber's request. This power is derived from the pre-trial chamber's statutory power under article 53(3)(a) of the Statute to request reconsideration and is meant to ensure the effectiveness of the procedure under said provision. If the pre-trial chamber lacked such a power, the Prosecutor could simply decide to ignore the request for reconsideration.⁵³

25. In the same vein, the Chamber considers that, in order to give effect to article 53(3)(a) of the Statute, it must ascertain not only whether the Prosecutor has reconsidered her decision, but whether she has done so *genuinely*. The pre-trial chamber's review must go beyond a mere 'box-ticking' or 'rubber-stamping' exercise and must be thorough, as opposed to cursory. This duty and power of the Chamber mirrors the Prosecutor's duty to demonstrate how she has reconsidered her decision, in light of the pre-trial chamber's directions, as acknowledged by the Appeals Chamber. The Appeals Chamber held that it does not suffice for the Prosecutor to simply state, in a cursory manner, that she has reconsidered her decision in light of the pre-trial chamber's directions, 'such that the authenticity of the exercise could be questioned'. She must demonstrate how she has addressed the pre-trial chamber's directions.⁵⁴

26. Having set out the relevant legal framework, the Chamber turns to its assessment of the 2019 Decision not to Investigate.

⁵² [Appeals Chamber's Judgment](#), ICC-01/13-98, paras 58, 76, 79.

⁵³ [Appeals Chamber's Judgment](#), ICC-01/13-98, paras 59-60; *see also* [Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"](#), 15 November 2018, ICC-01/13-68, para. 106.

⁵⁴ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 77.

IV. Grounds of review

27. In its Application for Judicial Review, the Comoros raises six grounds of review, submitting that the Prosecutor has erred: (i) in not applying the correct legal standard in determining whether to open an investigation;⁵⁵ (ii) in her consideration of those who bear the greatest responsibility for the crimes; (iii) in assessing the scale of the crimes; as well as (iv) the nature of the crimes; (v) the impact of the crimes; and (vi) the manner of commission of the crimes. The Chamber notes that the first ground of review, regarding the legal standard, is related to and runs through several of the other five grounds. For this reason, the Chamber will address it in the context of each of the grounds to which it relates, rather than separately.⁵⁶

28. For each ground of review, the Chamber will assess, first, whether the Prosecutor was bound to follow the relevant direction(s) of the Chamber contained in the Reconsideration Decision. The Chamber will not consider the Prosecutor to have been bound by those directions that the Appeals Chamber found to have been inappropriate. Second, the Chamber will assess whether the Prosecutor has properly reconsidered her 2014 Decision not to Investigate, in accordance with the Chamber's directions.

A. Persons or groups of persons likely to be the focus of the investigation

1. Reconsideration Decision

29. The Chamber found that the Prosecutor had failed to take into account in her determination of the gravity of the potential case(s), in the 2014 Decision not to Investigate, whether the persons or groups of persons likely to be the object of the investigation would include those who may bear the greatest responsibility for the alleged crimes.⁵⁷

⁵⁵ See also [Comoros Reply](#), ICC-01/13-110, para. 3. The Victims also submits that ‘the Prosecutor repeatedly failed to apply the “reasonable basis to proceed” standard as interpreted as a matter of law by the Chamber’; [OPCV Response](#), ICC-01/13-107, para. 27; [LRVs Response](#), ICC-01/13-108, paras 22-23.

⁵⁶ [Application for Judicial Review](#), ICC-01/13-100, paras 26-104.

⁵⁷ [Reconsideration Decision](#), ICC-01/13-34, paras 22-24.

2. *2019 Decision not to Investigate*

30. The Prosecutor advances that the persons appearing to bear the greatest responsibility for the alleged crimes are the physical perpetrators present on the *Mavi Marmara* and that they would therefore be the focus of the investigation.⁵⁸ With regard to senior IDF commanders and Israeli leaders, who were not present on the *Mavi Marmara*, the Prosecutor submits that there is no reasonable basis to believe that they could be responsible.⁵⁹

31. In assessing the weight to be attached to this factor, the Prosecutor has relied on two main considerations: (i) the scope of the potential cases is likely to be limited, considering the already limited scope of the situation; and (ii) the identification of the direct perpetrator(s) of the crimes of wilful killing and wilfully causing serious injury is likely to be difficult, given the chaotic circumstances in which the alleged crimes were committed.⁶⁰

3. *Application for Judicial Review*

32. The Comoros takes issue with the Prosecutor's conclusion that there is no reasonable basis to believe that senior IDF commanders and Israeli leaders are responsible, an aspect which the Comoros submits would have increased the gravity of the potential cases.⁶¹ More specifically, the Comoros argues that the Prosecutor: (i) has pre-set the object of the investigation by limiting it to the physical perpetrators, without considering that during the investigation she might find information pointing to individuals further up the chain of command; and (ii) has relied only on information made available to her by November 2014, deliberately excluding any information provided by the Comoros afterwards, which demonstrates that the

⁵⁸ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 22-24.

⁵⁹ The Prosecutor highlights that this assessment is based on the information available to her by November 2014, when the 2014 Decision not to Investigate was taken; [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 28.

⁶⁰ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 24-26, 29, 89, 93.

⁶¹ [Application for Judicial Review](#), ICC-01/13-100, paras 40, 45; *see also* [Comoros Reply](#), ICC-01/13-110, para. 33.

operation was carefully planned and directed by several ministries and the top echelons of the IDF.⁶²

4. *Victims' Responses*

33. The Victims represented by the LRVs concur with the Comoros, adding that they would be able to provide information that would enable the Prosecutor to investigate those most responsible, including those at the highest level.⁶³ The Victims submit that they have repeatedly offered to be interviewed, but this offer has never been accepted or even responded to by the Prosecutor.⁶⁴

5. *Determination of the Chamber*

i. Was the Prosecutor bound to follow the Chamber's direction

34. The Chamber finds that the Prosecutor was bound to reconsider her decision in accordance with the Chamber's direction. According to the Appeals Chamber's Judgment, the Prosecutor is bound to follow any direction of the Chamber that instructs her to take into account a certain factor in the gravity assessment.⁶⁵ The Chamber instructed the Prosecutor to consider whether the persons or groups of persons likely to be the object of the investigation would include those who may bear the greatest responsibility for the alleged crimes, which is a well-established factor in the assessment of the gravity of the potential cases.⁶⁶

ii. Has the Prosecutor properly reconsidered her decision

a. Preliminary issues

35. At the outset, the Chamber notes that the Comoros and the Prosecutor have different understandings of and disagree over: (a) the scope of the Chamber's direction; and (b) whether in reconsidering her decision the Prosecutor was expected to take into account information received after the date of the 2014 Decision not to

⁶² [Application for Judicial Review](#), ICC-01/13-100, paras 41-44.

⁶³ [LRVs Response](#), ICC-01/13-108, para. 26.

⁶⁴ [LRVs Response](#), ICC-01/13-108, para. 27.

⁶⁵ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 81.

⁶⁶ See para. 19 above.

Investigate, *i.e.* 6 November 2014. The Chamber will address these two issues first, before turning to its analysis of the 2019 Decision not to Investigate.

36. Regarding the scope of the Chamber's direction, the Comoros submits that the issue at stake is whether the investigation would extend to senior IDF commanders and Israeli leaders as the persons who appear to bear the greatest responsibility for the alleged crimes.⁶⁷ The Prosecutor submits that the Chamber never requested her to reconsider whether the investigation would encompass those who are most hierarchically senior, but whether it would encompass those who appear to be the most responsible.⁶⁸ As rightly submitted by the Prosecutor, the Chamber did not direct the Prosecutor to consider whether the investigation would extend to senior IDF commanders and Israeli leaders, but whether it would extend to those most responsible, whoever they may be. The Chamber specifically stated that this factor did not relate to the seniority or hierarchical position of the persons likely to be the object of the investigation, but to the Prosecutor's ability to investigate those most responsible.⁶⁹

37. Turning to the next issue, the Comoros submits that in reconsidering her decision, the Prosecutor has wrongly relied only on information that was available to her by November 2014 and has excluded any information provided by the Comoros after that date.⁷⁰ The Prosecutor advances that she was not required to take into consideration information made available after November 2014, as such information is material only to a review under article 53(4) of the Statute.⁷¹ As correctly submitted by the Prosecutor, the Chamber finds that the Prosecutor was required to reconsider her decision on the basis of the information available to her at the time the 2014 Decision not to Investigate was made, namely 6 November 2014. The Chamber has previously held that the reconsideration 'must be conducted on the basis of the information already in the Prosecutor's possession' at the time the initial decision

⁶⁷ [Application for Judicial Review](#), ICC-01/13-100, paras 41-43; [Comoros Reply](#), ICC-01/13-110, para. 33.

⁶⁸ [Prosecutor's Response](#), ICC-01/13-109, para. 20.

⁶⁹ [Reconsideration Decision](#), ICC-01/13-34, para. 23.

⁷⁰ [Application for Judicial Review](#), ICC-01/13-100, paras 40-44.

⁷¹ [Prosecutor's Response](#), ICC-01/13-109, para. 21.

under article 53(1) of the Statute is made.⁷² Any decision that takes into account ‘new facts and information’ amounts to a decision under article 53(4) of the Statute, not one under rule 108(3) of the Rules.

b. Merits

38. The Prosecutor has determined that the persons who appear to bear the greatest responsibility for the alleged crimes are the direct perpetrators and submits that they would be the likely objects of the investigation.⁷³ Nonetheless, she attaches limited weight to this factor because she assesses that (i) the potential cases arising from the situation would be of limited scope and (ii) the identification of the direct perpetrators of the crimes of wilful killing and wilfully causing serious injury is likely to be difficult.⁷⁴ The Chamber finds, for the reasons that follow, that the Prosecutor has committed new errors in her assessment of this factor.

39. *First*, the Prosecutor erred by engaging in an analysis of the scope of the potential case(s) as part of her assessment of the factor concerning the persons or groups of persons likely to be the object of the investigation. The Chamber notes that the Prosecutor has determined that the likely objects of the investigation would include those who may bear the greatest responsibility for the alleged crimes.⁷⁵ However, instead of stopping here, the Prosecutor went on to assess the scope of the potential cases in considering the weight to be attached to this factor.⁷⁶ The Chamber recalls that the factor concerning the persons or groups of persons likely to be the object of the investigation relates not to the scope of the potential cases, but to ‘the Prosecutor’s *ability* to investigate and prosecute those being the most responsible for the crimes under consideration’.⁷⁷ If the Prosecutor determines that the investigation would encompass the persons appearing to bear the greatest responsibility for the alleged crimes, she is bound to duly take this into account, with no further analysis being required. In assessing the scope of the potential cases, the Prosecutor has given

⁷² [Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”](#), 15 November 2018, ICC-01/13-68, para. 52.

⁷³ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 22-24, 89.

⁷⁴ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 24-26, 29, 89, 93.

⁷⁵ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 24; [Prosecutor’s Response](#), ICC-01/13-109, para. 20.

⁷⁶ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 24-29.

⁷⁷ [Reconsideration Decision](#), ICC-01/13-34, para. 23 (emphasis added).

weight to a consideration that is extraneous to the factor concerned, failing as a result to give proper weight to the consideration that *is* relevant, namely that the investigation would encompass those who may bear the greatest responsibility for the alleged crimes. The Chamber considers that such an approach is inappropriate – notwithstanding the margin of appreciation that the Prosecutor enjoys – as it results in not giving appropriate weight to a relevant factor, based on erroneous considerations.

40. *Second*, the Prosecutor erred by prematurely confining the scope of the potential cases and excluding from the scope of the investigation certain categories of persons. The Prosecutor submits that the investigation would be focused on the direct perpetrators as those appearing to bear the greatest responsibility.⁷⁸ With regard to the alleged crimes of wilful killing and wilfully causing serious injury, she adds that there is no information available to suggest that other persons than the direct perpetrators would be responsible, as accessories or superiors, as ‘it cannot be assumed that [they] necessarily made sufficient contributions to the identified crimes’ and/or acted or failed to act with the required intent and knowledge.⁷⁹ The Chamber notes that the Prosecutor has essentially excluded from the scope of the potential case(s) and the scope of the investigation all categories of persons apart from the direct perpetrators,⁸⁰ from the immediate commanders of the troops who carried out the boarding⁸¹ to the senior IDF commanders and Israeli leaders.⁸²

41. This approach is incompatible with the object and purpose of article 53(1) of the Statute. The Chamber recalls that pre-trial chambers have consistently held that the assessment of the persons or groups of persons likely to be the object of the investigation ‘should be general in nature and compatible with the pre-investigative stage’.⁸³ Its purpose is to enable the Prosecutor to assess admissibility at the situation stage,⁸⁴ not to determine who is likely to be responsible and who is not. The

⁷⁸ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 24.

⁷⁹ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 26.

⁸⁰ Except with regard to the alleged crimes of outrages upon personal dignity, in relation to which the Prosecutor submits that the likely objects of the investigation could encompass accessories or superiors aboard the *Mavi Marmara*; [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 27.

⁸¹ Commanders who were in a position to authorise or not the use of lethal and less-lethal weapons, after the boarding operation started.

⁸² [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 28.

⁸³ See para. 19 above.

⁸⁴ [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 50.

‘reasonable basis to believe’ standard in article 53(1) ‘was not designed to determine whether a particular person was involved in the commission of a crime within the Court’s jurisdiction’.⁸⁵ Determinations regarding individual criminal responsibility involve questions relating to the precise contribution of the person involved, his/her *mens rea*, possible modes of liability and possible grounds for excluding criminal responsibility,⁸⁶ none of which can be definitively answered on the basis of the limited information available at this stage. The Prosecutor’s assessment of the persons or groups of persons likely to be the object of the investigation should never lead to the exclusion of certain categories of persons before the investigation has even begun.

42. The Prosecutor’s approach is also contrary to her obligation under article 54(1)(a) of the Statute to ‘establish the truth’ and ‘extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under [the] Statute’. The Prosecutor has an obligation to extend the investigation to cover all possible categories of perpetrators and may not *a priori* exclude any of them.

43. The Chamber notes further that the Prosecutor’s assessment also conflicts with the standard of proof as interpreted by the Chamber. The Prosecutor submits that ‘there is no information available that suggests any investigation [...] would *necessarily* establish the responsibility of other persons as accessories [...] or as superiors’ and that ‘it cannot be assumed that members of the IDF other than the perpetrator(s) [...] *necessarily* made sufficient contributions to the identified crimes with the required intent and knowledge’.⁸⁷ The Prosecutor appears to require the available information to already support at this stage the conclusion that accessories or superiors are undoubtedly responsible or that the investigation will undoubtedly reveal that they are. The Chamber recalls that to satisfy the ‘reasonable basis to believe’ standard, the available information need not point towards only one conclusion.⁸⁸ It may point towards several conclusions, all reasonable and sensible, only one of which needs to be that a crime under the jurisdiction of the Court has been or is being committed. In the presence of several plausible explanations, the

⁸⁵ [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 32.

⁸⁶ See also para. 70 below.

⁸⁷ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 26 (emphasis added).

⁸⁸ See para. 16 above.

Prosecutor is obliged to initiate an investigation in order to be able to properly assess the facts.⁸⁹ In other words, contrary to what the Prosecutor seems to suggest, she does not need to establish with any degree of certainty that the investigation will establish the responsibility of accessories or superiors, as this is precisely the purpose of an investigation.

44. *Third*, the Prosecutor erred by relying in her assessment of this factor on possible difficulties in the identification of the alleged perpetrators. The Prosecutor submits that in considering the weight to be given to this factor she has taken into account the fact that the ‘identification to the requisite standard of the direct physical perpetrator(s) of the crimes of wilful killing and wilful causing of serious injury is [...] likely to be difficult, even with the benefit of investigation’.⁹⁰ The Chamber finds this consideration to be irrelevant to the gravity of the potential cases. An investigation may encounter numerous obstacles, from difficulties in the identification of the alleged perpetrators, to difficulties in the collection of evidence and in securing the arrest of the alleged perpetrators. However, these are not relevant factors in the assessment of gravity, nor appropriate reasons not to initiate an investigation. The Chamber considers that it was inappropriate for the Prosecutor – notwithstanding the margin of appreciation that she enjoys – to rely on a consideration that is not relevant to the gravity requirement when assessing the weight to be attached to a factor that *is* relevant. This inevitably results in failing to give appropriate weight to a relevant factor, based on erroneous considerations.

45. In light of the above, the Chamber finds that the Prosecutor has not *genuinely* reconsidered her decision. Despite the fact that the Prosecutor has determined that the investigation would encompass the persons who may bear the greatest responsibility for the alleged crimes, the Prosecutor appears to have assigned limited weight to this factor based on erroneous considerations. More specifically, she has relied on her determination that the scope of the potential cases would be limited, an assessment which is extraneous to the issue at hand. It is also contrary to articles 53(1) and 54(1)(a) of the Statute and inconsistent with the standard of proof as interpreted by the Chamber. Further, the Prosecutor erroneously relied on the fact that the identification

⁸⁹ [Reconsideration Decision](#), ICC-01/13-34, para. 13.

⁹⁰ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 25, 89.

of the direct perpetrators is likely to be difficult, a consideration which is not relevant to the gravity assessment.

B. Scale of the alleged crimes

1. Reconsideration Decision

46. The Chamber found that the Prosecutor erred in the 2014 Decision not to Investigate in concluding that the scale of the crimes was an indicator of insufficient gravity.⁹¹ The Prosecutor had found that the alleged crimes resulted in 10 persons killed, around 50 to 55 injured and an unspecified number of victims of outrages upon personal dignity, from among the more than 500 passengers of the *Mavi Marmara*. The Prosecutor considered this number to be relatively limited.⁹² The Chamber held that, to the contrary, ‘ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhumane treatment’ were ‘a compelling indicator of sufficient, and not of insufficient gravity’ exceeding the number of casualties in cases already prosecuted before the Court.⁹³

2. 2019 Decision not to Investigate

47. The Prosecutor has maintained her position that the scale of the victimisation is relatively limited.⁹⁴ She submits that the cases arising from the situation are likely to be more limited in scope than the situation itself, as ‘it cannot be assumed that the same individual(s) may be established as perpetrator(s) for *all* of the identified crimes, in the meaning of article 25(3)(a) of the Statute’.⁹⁵ The Prosecutor has attached particular weight to the limited scale of the victimisation in her assessment of the gravity of the potential cases.⁹⁶

⁹¹ [Reconsideration Decision](#), ICC-01/13-34, para. 26.

⁹² [2014 Decision not to Investigate](#), ICC-01/13-6-AnxA, para. 138.

⁹³ [Reconsideration Decision](#), ICC-01/13-34, para. 26.

⁹⁴ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 92.

⁹⁵ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 25, 34, 89, 93 (emphasis in the original).

⁹⁶ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 92.

3. *Application for Judicial Review*

48. The Comoros submits that the Prosecutor has failed to consider, for the purpose of assessing the scale of the alleged crimes, evidence of torture or inhumane treatment, which the Chamber instructed her to take into account.⁹⁷ In addition, the Comoros advances that the Prosecutor has committed a new error by ‘artificially segregate[ing] the various crimes’ and attributing them to individual direct perpetrators, thereby prematurely downgrading and diluting the seriousness of the cases.⁹⁸ The Comoros adds that, in any event: (i) the Prosecutor has the ability to investigate the persons in command of the operation who ordered and supervised it, not only the individual perpetrators; (ii) she may bring cases with multiple accused to cover the full spectrum of the alleged conduct; and (iii) she should have recognised that the victimisation extends beyond the passengers of the *Mavi Marmara*, to other human rights campaigners who would have felt threatened and silenced by the crimes committed.⁹⁹

4. *Victims’ Responses*

49. In the same vein, the Victims represented by the LRVs submit that the Prosecutor has erred in: (i) failing to consider evidence of torture and inhumane treatment; (ii) diminishing the scale of the alleged crimes by dividing them up instead of taking them as a whole; (iii) failing to find that the victims’ status as civilians, humanitarian workers and human rights defenders affected the gravity of the potential cases; and (iv) failing to recognise that the number of victims weighs in favour of sufficient gravity. In this regard, the LRVs highlight that the number of victims participating in these proceedings is close to 500 and is thus comparable to other cases found to have been sufficiently grave for prosecution before the Court.¹⁰⁰

⁹⁷ [Application for Judicial Review](#), ICC-01/13-100, paras 48-50.

⁹⁸ [Application for Judicial Review](#), ICC-01/13-100, paras 51-53.

⁹⁹ [Application for Judicial Review](#), ICC-01/13-100, paras 51-56.

¹⁰⁰ [LRVs Response](#), ICC-01/13-108, paras 30-49.

5. *Determination of the Chamber*

i. *Was the Prosecutor bound to follow the Chamber's direction*

50. The Chamber finds that the Prosecutor was not bound by the Chamber's direction. According to the Appeals Chamber's Judgment, the Chamber may not direct the Prosecutor as to what weight to assign to individual factors and what result she should reach in the gravity assessment.¹⁰¹ The Chamber directed the Prosecutor to take into account the factor of scale as an indicator of sufficient gravity, thereby instructing her to assign it specific weight.¹⁰² This direction was explicitly found by the Appeals Chamber to have been inappropriate.¹⁰³

C. **Nature of the alleged crimes**

1. *Reconsideration Decision*

51. The Chamber found that the Prosecutor had erred in her 2014 Decision not to Investigate in her assessment that the mistreatment inflicted on the passengers of the *Mavi Marmara* did not amount to the war crime of torture or inhumane treatment (article 8(2)(a)(ii) of the Statute), but only to the war crime of outrages upon personal dignity (article 8(2)(b)(xxi) of the Statute).¹⁰⁴ The Prosecutor had determined that the mistreatment allegedly inflicted on the passengers of the *Mavi Marmara* did not appear to amount to 'severe' pain or suffering, so as to qualify as inhumane treatment under article 8(2)(a)(ii) of the Statute.¹⁰⁵ The Chamber held that the Prosecutor's assessment of the severity of the pain and suffering had been premature in light of the limited information available at this stage. The Prosecutor should have recognised that there was a reasonable basis to believe that the war crime of torture or inhumane treatment was committed.¹⁰⁶ The Chamber also highlighted that the nature of the

¹⁰¹ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 81.

¹⁰² [Reconsideration Decision](#), ICC-01/13-34, para. 26.

¹⁰³ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 93.

¹⁰⁴ [Reconsideration Decision](#), ICC-01/13-34, para. 30.

¹⁰⁵ [2014 Decision not to Investigate](#), ICC-01/13-6-AnxA, paras 69, 139.

¹⁰⁶ [Reconsideration Decision](#), ICC-01/13-34, para. 30.

crimes revolved around the relative gravity of the possible legal qualification of the facts.¹⁰⁷

2. *2019 Decision not to Investigate*

52. The Prosecutor has maintained her assessment that the mistreatment allegedly inflicted on the passengers of the *Mavi Marmara* does not amount to torture or inhumane treatment, only to outrages upon personal dignity.¹⁰⁸ In this regard, she submits that the Appeals Chamber found the Chamber's direction to have been inappropriate.¹⁰⁹

53. In considering the weight to be attached to the nature of the crimes, the Prosecutor submits that: (i) the possibility that the alleged conduct could be characterised as inhumane treatment carries no weight, as it is the factual nature of the conduct that counts and not the legal characterisation;¹¹⁰ (ii) while a large number of passengers may have been subjected to one or more forms of mistreatment, only a smaller group appear to have been subjected to all or most forms of mistreatment, which varied in nature and degree;¹¹¹ and (iii) the alleged crimes of wilful killing and wilfully causing serious injury were committed in the context of the passengers' violent resistance to the boarding of the *Mavi Marmara* and any investigation would need to determine the status of each victim, their activities at the material time and the responsibility of the alleged perpetrators, including whether they acted in self-defence.¹¹²

3. *Application for Judicial Review*

54. The Comoros submits that the Prosecutor (i) ignored the Chamber's interpretation of the 'reasonable basis to proceed' standard, (ii) disregarded evidence concerning the abuse and mistreatment of the passengers aboard the *Mavi Marmara*,

¹⁰⁷ [Reconsideration Decision](#), ICC-01/13-34, para. 28.

¹⁰⁸ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 89.

¹⁰⁹ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 42.

¹¹⁰ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 42-43.

¹¹¹ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 38-40, 89.

¹¹² [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 89.

and (iii) ignored the fact that the legal characterisation of the evidence has a substantial effect on the question of gravity.¹¹³

4. *Victims' Responses*

55. Both groups of Victims submit that the Prosecutor failed to adequately take into account evidence of physical mistreatment that could amount to torture and inhuman treatment, failed to apply the correct legal standard and pre-judged the severity of the pain and suffering.¹¹⁴ The Victims represented by the OPCV add that the Prosecutor engaged in speculation with regard to the extent of the victimisation.¹¹⁵

5. *Determination of the Chamber*

i. Was the Prosecutor bound to follow the Chamber's direction

56. The Prosecutor submits that the Appeals Chamber identified this direction as an example of when the Chamber impermissibly applied its interpretation of the 'reasonable basis to believe' standard to the facts.¹¹⁶ The Chamber finds, for the reasons that follow, that the Prosecutor was bound by the Chamber's direction in part.

57. *First*, the Chamber considers that the Prosecutor has misread the Appeals Chamber's Judgment. The Chamber understands that the Appeals Chamber has found the Chamber's direction to have been inappropriate to the extent that it instructed the Prosecutor to *conclude* that there was a reasonable basis to believe that acts qualifying as torture or inhumane treatment were committed.¹¹⁷ In this regard, the Chamber recalls that, according to the Appeals Chamber's Judgment, it may not direct the Prosecutor as to what factual findings to make and how to apply the law to the facts.¹¹⁸ However, the Prosecutor was still bound to reconsider her factual findings by *applying the Chamber's interpretation of the 'reasonable basis to believe' standard*. Elsewhere in the Judgment, the Appeals Chamber stated that it is 'not open to the

¹¹³ [Application for Judicial Review](#), ICC-01/13-100, paras 58, 61-65; *see also* paras 48-50; *see also* [Comoros Reply](#), ICC-01/13-110, para. 40.

¹¹⁴ [OPCV Response](#), ICC 01/13-107, paras 33-34; [LRVs Response](#), ICC-01/13-108, paras 32-37, 50-54.

¹¹⁵ [OPCV Response](#), ICC-01/13-107, para. 35.

¹¹⁶ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 42.

¹¹⁷ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 92.

¹¹⁸ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 80.

Prosecutor, despite the margin of appreciation that she enjoys [...], to disagree with, or fail to adopt, a legal interpretation of the pre-trial chamber that is contained in a request for reconsideration' and this applies to the Chamber's interpretation of the evidentiary standard.¹¹⁹

58. *Second*, the Chamber recalls that in the Reconsideration Decision it found that the legal qualification of the facts is a matter relevant to the gravity of the potential cases, as part of the nature of the crimes.¹²⁰ Thereby, the Chamber directed the Prosecutor to take the legal characterisation of the conduct into account as a factor in her assessment of the gravity of the potential case(s). The Chamber recalls that, according to the Appeals Chamber's Judgment, it may oblige the Prosecutor to take into account certain factors and/or information relating thereto in the assessment of gravity.¹²¹

59. In light of the above, the Chamber finds that the Prosecutor was bound to reconsider her decision by: (i) applying the Chamber's interpretation of the 'reasonable basis to believe' standard to the facts concerning the alleged mistreatment of the passengers of the *Mavi Marmara*; and (ii) taking into account the legal characterisation of the facts, as part of the nature of the crimes, in her assessment of the gravity of the potential case(s). Conversely, the Prosecutor was not bound by the Chamber's direction to the extent that it instructed her to *conclude* that there was a reasonable basis to believe that acts qualifying as torture or inhumane treatment had been committed.

ii. Has the Prosecutor properly reconsidered her decision

60. The Chamber finds, for the reasons that follow, that the Prosecutor has failed to correct the errors identified by the Chamber and has also committed new errors.

61. *First*, the Prosecutor has failed to reconsider her factual findings regarding the mistreatment allegedly inflicted on the passengers of the *Mavi Marmara* by applying the evidentiary standard as interpreted by the Chamber. In the 2014 Decision not to

¹¹⁹ [Appeals Chamber's Judgment](#), ICC-01/13-98, paras 78, 90.

¹²⁰ [Reconsideration Decision](#), ICC-01/13-34, para. 28.

¹²¹ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 81.

Investigate, the Prosecutor found that there was no reasonable basis to believe that the mistreatment allegedly inflicted on the passengers of the *Mavi Marmara* included the deliberate denial of medical treatment. This conclusion rests on the Prosecutor's assessment that

based on the information available at this stage, it is *unclear* whether the difficulties that some wounded passengers encountered in receiving medical treatment was (*sic*) due to the deliberate acts of the IDF or *alternatively* was (*sic*) an unintended consequence of the logistical and practical difficulties faced by medical personnel in locating and treating the injured on board the vessel.¹²²

The Prosecutor considered that the 'reasonable basis to believe' standard had not been met because of a lack of clarity in the available information and the existence of conflicting accounts and alternative explanations. In the Reconsideration Decision, the Chamber found this interpretation and application of the evidentiary standard to be incorrect. The Chamber held that when facts are difficult to establish, information is unclear and conflicting accounts exist, giving rise to several plausible explanations, the Prosecutor is obliged to open an investigation in order to properly assess the facts.¹²³

62. The Prosecutor was bound to reconsider her factual findings in light of the Chamber's interpretation of the standard of proof.¹²⁴ Her failure to do so materially affected¹²⁵ her conclusion that the alleged conduct did not amount to the war crime of torture or inhumane treatment. The deliberate denial of medical treatment has been found in the jurisprudence of the Court and of other courts to amount to cruel treatment as a war crime under article 8(2)(c)(i) of the Statute,¹²⁶ or to other inhumane acts as a crime against humanity.¹²⁷ By extension, it would also amount to inhumane treatment as a war crime under article 8(2)(a)(ii) of the Statute.

¹²² [2014 Decision not to Investigate](#), ICC-01/13-6-AnxA, para. 68 (emphasis added).

¹²³ [Reconsideration Decision](#), ICC-01/13-34, para. 13.

¹²⁴ See paras 57, 59 above.

¹²⁵ [Reconsideration Decision](#), ICC-01/13-34, para. 12.

¹²⁶ Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), 13 November 2019, ICC-01/12-01/18-461-Corr-Red, para. 260.

¹²⁷ ECCC, Trial Chamber, *The Prosecutor v. KAINING Guek Eav alias Duch*, Judgment, 26 July 2010, Case File 001/18-07-2007/ECCC/TC, paras 372-373.

63. The Prosecutor appears to suggest that she was not bound to reconsider these factual findings because the types of mistreatment allegedly inflicted on the passengers of the *Mavi Marmara* were never materially in dispute.¹²⁸ Put differently, she advances that the Chamber never requested her to reconsider these findings. The Chamber finds that the Prosecutor was misguided on this point. The Chamber specifically found that the Prosecutor's exclusion of the war crime of torture or inhumane treatment was 'premature' at this stage of the proceedings.¹²⁹ The Chamber also laid down the correct interpretation of the evidentiary standard applicable at this stage.¹³⁰ While the Chamber did not single out specific findings, the Prosecutor was bound to reconsider *all* relevant factual findings that had been based on an incorrect interpretation of the standard.

64. *Second*, the Prosecutor erred by failing to take into account the legal characterisation of the facts in her assessment of the gravity of the potential cases. The Prosecutor submits that 'even if the material conduct could properly be characterised as inhumane treatment, this would not alter the weight afforded to the "nature" of the crime', as it is the factual nature of the conduct that carries weight, not its legal characterisation. On this basis, she has accorded 'neutral significance' to the legal characterisation of the conduct.¹³¹

65. The Chamber notes that the Appeals Chamber has, in a different context, confirmed that the legal characterisation is a relevant consideration for the purpose of assessing gravity, as each 'crime under the statute represents distinct values of the international community that have allegedly been violated'.¹³² Therefore, whether the relevant conduct can be characterised as torture or inhumane treatment, or as outrages upon personal dignity is not irrelevant, as argued by the Prosecutor.

66. In according 'neutral significance' to the legal characterisation of the facts, the Prosecutor has essentially failed to take this factor into account in the gravity assessment, contrary to the Chamber's direction. While the Prosecutor enjoys a

¹²⁸ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 37, 38, 43.

¹²⁹ [Reconsideration Decision](#), ICC-01/13-34, para. 30.

¹³⁰ [Reconsideration Decision](#), ICC-01/13-34, para. 13.

¹³¹ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 43.

¹³² [Al Hassan Admissibility Judgment](#), ICC-01/12-01/18-601-Red, paras 121-124, 127(ix).

margin of appreciation in the weight that she assigns to the different factors, it is not open to her not to attach *any* weight to said factors.¹³³ Doing so essentially amounts to disregarding the Chamber's direction and constitutes an abuse of the Prosecutor's margin of appreciation.

67. *Third*, the Prosecutor has committed a new error by making a premature assessment of the extent and nature of the victimisation. The Prosecutor submits that, in assessing the weight to be attached to the nature of the crimes, she considered the fact that, while a large number of passengers may have been subjected to one or more forms of mistreatment, only a smaller group appear to have been subjected to all or most forms of mistreatment.¹³⁴ While it is not entirely clear what the Prosecutor seeks to advance with these observations, she appears to suggest that each of the potential cases arising from the situation will encompass only part of the victimisation and some cases will be less grave than others because some of the victims were subjected to fewer or less severe forms of mistreatment.¹³⁵ The Chamber recalls that it is premature for the Prosecutor to engage in such a specific assessment of the scope of the potential cases at this stage.¹³⁶ Furthermore, the Chamber highlights that the severity of the mistreatment depends on not only the *type* of mistreatment allegedly inflicted, but also the personal circumstances of the victims (their physical, mental or medical condition, age, sex, whether they are particularly defenceless, vulnerable or in a position of inferiority).¹³⁷ Forms of mistreatment, such as handcuffing and restrictions of movement, that appear in the abstract to be less serious,¹³⁸ may be particularly severe when viewed against the personal circumstances of the victims. In this regard, the Chamber notes that some of the passengers of the *Mavi Marmara*

¹³³ See also [Application for Judicial Review](#), ICC-01/13-100, para. 49.

¹³⁴ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 38, 40, 89.

¹³⁵ See [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 93.

¹³⁶ See paras 40-41 above.

¹³⁷ Rule 145(2)(b)(iii) of the Rules; Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), 30 September 2019, ICC-01/12-01/18-461-Corr-Red (date of corrected version 8 November 2019), para. 230; [Rectificatif de la Décision portant modification des charges confirmées le 30 septembre à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud 2019](#), 23 April 2020, ICC-01/12-01/18-767-Corr-Red (date of corrected version 1 May 2020), para. 108.

¹³⁸ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 38.

were wounded when they were allegedly beaten or handcuffed and forced to stand kneeling on the deck for hours.¹³⁹

68. *Fourth*, the Prosecutor has committed a new error by taking into consideration, in assessing the weight to be attached to the nature of the crimes, questions concerning the status of the victims and potential grounds for excluding criminal responsibility. The Prosecutor submits that she has assessed the nature of the crimes with reference to the fact that the alleged crimes of wilful killing and wilfully causing serious injury were committed in the context of the passengers' violent resistance to the boarding of the *Mavi Marmara* and that any investigation would need to determine the status of each victim at the relevant time and the responsibility of the alleged perpetrators, including whether they acted in self-defence.¹⁴⁰

69. The Chamber finds that these considerations are irrelevant to the assessment of the gravity of the potential case(s). The status of the victim, *i.e.* whether the person was protected under one or more of the Geneva Conventions of 1949, is an element of the war crimes of wilful killing and wilfully causing serious injury.¹⁴¹ As such, it is part of the Prosecutor's assessment under article 53(1)(a) of the Statute, not article 53(1)(b). The Chamber notes that the Prosecutor has already concluded in her 2014 Decision not to Investigate that there is a reasonable basis to believe that the passengers of the *Mavi Marmara* qualified as protected persons and that their killing and injury amounted to the war crimes of wilful killing and wilfully causing serious injury.¹⁴² Once the Prosecutor determines under article 53(1)(a) of the Statute that there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed, it is inappropriate for her to rely on uncertainties or the existence of several plausible explanations as to the alleged commission of the crimes in order to assign less weight to the nature of the crimes under article 53(1)(b) of the Statute. Such uncertainties are inherent in the 'reasonable basis to believe' standard.

¹³⁹ [2014 Decision not to Investigate](#), ICC-01/13-6-AnxA, para. 75; [OPCV Response](#), ICC-01/13-107, para. 34.

¹⁴⁰ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 89.

¹⁴¹ Element 2 of articles 8(2)(a)(i) and 8(2)(a)(iii) of the Elements of Crimes.

¹⁴² [2014 Decision not to Investigate](#), ICC-01/13-6-AnxA, paras 43-53, 61, 76-77.

70. Similarly, self-defence is a ground for excluding criminal responsibility under article 31(1)(c) of the Statute, not a factor in the assessment of gravity. It is premature for the Prosecutor to rely on the possible existence of grounds for excluding criminal responsibility at this stage. The Prosecutor herself has previously submitted that whether a perpetrator committed the crime in self-defence is to be properly addressed at the investigation and trial stages, not at the preliminary examination stage.¹⁴³

71. In light of the above, the Chamber finds that the Prosecutor has not *genuinely* reconsidered her decision. More specifically, the Prosecutor has: (i) failed to reconsider her factual findings with regard to the mistreatment allegedly inflicted on the passengers of the *Mavi Marmara* by applying the evidentiary standard as interpreted by the Chamber; and (ii) failed to take into account the legal characterisation of the facts as a relevant factor in the gravity assessment. In addition, the Prosecutor has committed new errors by: (i) making a premature assessment of the extent and nature of the victimisation; and (ii) relying on considerations that are not relevant to the gravity assessment.

D. Impact of the alleged crimes

1. Reconsideration Decision

72. The Chamber found that the Prosecutor had erred in the 2014 Decision not to Investigate in considering the impact of the alleged crimes to be an indicator of insufficient gravity. The Prosecutor had advanced that, while the alleged crimes had a significant impact on the victims, their families and other passengers involved, they did not appear to have a significant impact on the population in Gaza.¹⁴⁴ The Chamber found that the Prosecutor had failed to consider that, before attempting a determination of the impact of the alleged crimes on the lives of the people in Gaza, the significant impact of such crimes on the lives of the victims and their families was, in itself, an indicator of sufficient gravity. Further, the Prosecutor should have, in any case, recognised the possibility that the alleged crimes had an impact going beyond the suffering of the direct and indirect victims as: (i) they would have sent a

¹⁴³ [2014 Decision not to Investigate](#), ICC-01/13-6-AnxA, para. 57.

¹⁴⁴ [2014 Decision not to Investigate](#), ICC-01/13-6-AnxA, para. 141.

clear and strong message to the people in Gaza and beyond that the blockade was in full force and that the delivery of humanitarian aid was controlled by the Israeli authorities; and (ii) the events triggered international concern, leading to the establishment of several fact-finding missions, including at the UN level.¹⁴⁵

2. *2019 Decision not to Investigate*

73. The Prosecutor submits that the weight accorded to the impact of the alleged crimes on the direct and indirect victims is closely related to the scale of the crimes, which is relatively small.¹⁴⁶ Regarding the impact of the alleged crimes on the population in Gaza and beyond, the Prosecutor advances that only minimum weight attaches to this aspect, as she is not in a position to assess the symbolic, moral or political effects of the alleged crimes in any objective or reliable way.¹⁴⁷ In response to the Chamber's observation that the events triggered international concern, the Prosecutor notes that five domestic authorities (outside of Israel) have opened criminal investigations into the events aboard the *Mavi Marmara*, but discontinued their inquiries. The Prosecutor submits that the fact that national authorities have not considered it appropriate to refer the events for further investigation or prosecution may potentially be an indication of insufficient gravity.¹⁴⁸

3. *Application for Judicial Review*

74. The Comoros submits that the Prosecutor has erred in her assessment of the impact of the alleged crimes by: (i) failing to indicate how she has assessed the impact of the crimes on the lives of the victims and their families; (ii) disregarding information on the physical, psychological and emotional harm suffered by the direct and indirect victims; (iii) failing to collect and assess evidence of the impact of the alleged crimes on communities in Palestine, Israel and abroad; (iv) disregarding the

¹⁴⁵ [Reconsideration Decision](#), ICC-01/13-34, paras 47-48.

¹⁴⁶ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 44-47, 89.

¹⁴⁷ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 48-50.

¹⁴⁸ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 51-53, 93.

two international inquiries conducted by the UN; and (v) relying on domestic proceedings and their discontinuation to diminish the severity of the alleged crimes.¹⁴⁹

4. *Victims' Responses*

75. The Victims concur with the Comoros in that the Prosecutor has (i) failed to take into account the significant impact of the alleged crimes on the lives of the victims and their families, (ii) failed to explain how she considered and analysed this impact, (iii) ignored evidence of the impact of the alleged crimes on communities in Gaza and the Occupied Palestinian Territories, as well as on all humanitarian workers and human rights advocates, and (iv) unfairly minimised the impact of the alleged crimes by relying on the Victims' efforts to exhaust domestic remedies.¹⁵⁰

5. *Determination of the Chamber*

i. *Was the Prosecutor bound to follow the Chamber's direction*

76. The Chamber finds that the Prosecutor was bound by the Chamber's direction in part. When the Chamber instructed the Prosecutor to recognise the possibility that the alleged crimes had an impact on the people in Gaza and beyond, and to take into account the international concern caused by the events, the Chamber essentially directed her to take these aspects into account as factors and/or information in her assessment of the gravity of the potential cases. According to the Appeals Chamber's Judgment, the Prosecutor is bound to follow directions of the Chamber which instruct her to take into account certain factors and/or information related thereto.¹⁵¹ However, the Prosecutor was not bound by the Chamber's direction to the extent that it instructed her to *conclude* that the impact of the alleged crimes was an indicator of sufficient gravity. The Appeals Chamber identified this direction of the Chamber as being inappropriate as the Chamber directed the Prosecutor to assign specific weight to a given factor.¹⁵²

¹⁴⁹ [Application for Judicial Review](#), ICC-01/13-100, paras 66-80; *see also* [Comoros Reply](#), ICC-01/13-110, paras 41-45.

¹⁵⁰ [OPCV Response](#), ICC 01/13-107, paras 38-40; [LRVs Response](#), ICC-01/13-108, paras 55-66.

¹⁵¹ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 81.

¹⁵² [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 93.

ii. *Has the Prosecutor properly reconsidered her decision*

77. The Chamber finds, for the reasons that follow, that the Prosecutor has failed to correct the errors identified by the Chamber in the Reconsideration Decision and has also committed new errors.

78. *First*, the Prosecutor has failed to take into account the international concern triggered by the events, as instructed by the Chamber. In the 2019 Decision not to Investigate, the Prosecutor recalls the fact-finding efforts which followed the events, but provides no explanation of how she has taken this information into account and what weight she has assigned to it, if any.¹⁵³ The Prosecutor is obliged to show how she has assessed the information in order to demonstrate to the Chamber that she has taken it into account.¹⁵⁴ The fact that she enjoys a margin of appreciation in the weight that she attaches to it does not detract from her obligation to demonstrate how she has assessed the issue. The Prosecutor's failure to do so calls into question the authenticity of her reconsideration¹⁵⁵ and leads the Chamber to conclude that the Prosecutor has not assigned *any* weight to the international concern triggered by the events.

79. *Second*, the Prosecutor has committed a new error by failing to take into account the impact of the alleged crimes on the lives of the victims and their families. The Prosecutor submits that the impact of the alleged crimes is closely related to the scale of the crimes and, since the scale is relatively limited, the impact should also be afforded limited weight.¹⁵⁶ As rightly submitted by the Comoros, considerations regarding the scale of the victimisation do not however address the impact on the victims.¹⁵⁷ Scale and impact are two separate factors in the gravity assessment, which should not be confused or collapsed into one another. The scale of the crimes relates to the number of victims, the geographical area affected, and the span and intensity of the alleged crimes over time.¹⁵⁸ The impact relates primarily to the extent of the

¹⁵³ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 51.

¹⁵⁴ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 77.

¹⁵⁵ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 77.

¹⁵⁶ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 45-47, 89, 92.

¹⁵⁷ [Comoros Reply](#), ICC-01/13-110, para. 43.

¹⁵⁸ See para. 20 above.

damage caused and the harm suffered by the victims,¹⁵⁹ which may be physical, psychological or material (such as physical injury, loss of a family member, psychological trauma, including as a result of witnessing and/or fearing the commission of the crimes, loss of opportunities in relation to education and/or employment, or loss of earnings).¹⁶⁰

80. The Prosecutor submits that she has taken into account the impact on the direct and indirect victims, but accorded it limited weight.¹⁶¹ Yet, there is no indication in the 2019 Decision not to Investigate that the Prosecutor has considered the harm suffered by the victims. The Prosecutor's failure to demonstrate how she has assessed the harm suffered by the victims leads the Chamber to conclude that the Prosecutor has not assigned any weight to the impact of the alleged crimes on the direct and indirect victims.¹⁶² The Chamber reiterates that the fact that the Prosecutor enjoys a margin of appreciation in the weight that she assigns to the different factors does not mean that it is open to her not to attach *any* weight to said factors. This approach constitutes an abuse of the Prosecutor's margin of appreciation.

81. *Third*, the Prosecutor has also committed a new error by relying on the conduct of national proceedings in her assessment of the gravity of the potential cases. The Prosecutor submits that five domestic prosecuting authorities have initiated inquiries into the events, but none has found it necessary or appropriate to open criminal investigations.¹⁶³ The Prosecutor considers this to be an indicator of insufficient gravity.¹⁶⁴

82. The Chamber finds that the conduct of national proceedings is not a relevant consideration in the assessment of the gravity of the potential case(s). Such considerations are only relevant in the context of assessing complementarity, under article 17(1)(a)-(c) of the Statute. In addition, nothing in the Prosecutor's

¹⁵⁹ See para. 20 above.

¹⁶⁰ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Order for Reparations](#), ICC-01/04-01/06-3129-AnxA, para. 40, annexed to [Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012](#), 3 March 2015, ICC-01/04-01/06-3129; Trial Chamber II, *The Prosecutor v. Germain Katanga*, [Order for Reparations pursuant to Article 75 of the Statute](#), 24 March 2017, ICC-01/04-01/07-3728-tENG, paras 112-114, 123-129.

¹⁶¹ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 47, 89.

¹⁶² See [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 77.

¹⁶³ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 52.

¹⁶⁴ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 53, 93.

2019 Decision not to Investigate suggests that the national proceedings were discontinued for reasons related to the gravity of the cases. The Chamber fails to see why the Prosecutor has considered the conduct of the national proceedings to be an indicator of insufficient gravity. Even if such proceedings have been discontinued for reasons related to the gravity of the cases, the Prosecutor is bound to conduct her own independent assessment (based on the Court's statutory framework and the information available to her) and may not rely on the assessment of other courts. The Chamber considers that it was inappropriate for the Prosecutor – notwithstanding the margin of appreciation that she enjoys – to rely on considerations that are not relevant to the gravity requirement when assessing the weight to be attached to a factor that *is* relevant. This inevitably results in failing to give appropriate weight to a relevant factor, based on erroneous considerations.

83. In light of the above, the Chamber finds that the Prosecutor has not *genuinely* reconsidered her decision as she: (i) failed to take into account the international concern triggered by the events; (ii) failed to take into account the impact of the alleged crimes on the direct and indirect victims; and (iii) relied on considerations that are not relevant to the gravity assessment in determining the weight to be attached to the impact of the alleged crimes.

E. Manner of commission of the alleged crimes

1. Reconsideration Decision

84. The Chamber found that the Prosecutor had erred in the 2014 Decision not to Investigate in finding that 'the information available [did] not suggest that the alleged crimes were systematic or resulted from a deliberate plan or policy'.¹⁶⁵ The Chamber considered that the Prosecutor's finding had been based on a number of errors, as follows: (i) the Prosecutor failed to take into account information that live fire had been used by the IDF prior to the boarding of the *Mavi Marmara*, a fact which may reasonably suggest that there was a prior intention and plan to kill the passengers; (ii) the Prosecutor failed to consider that the systematic abuse of the passengers of the

¹⁶⁵ [Reconsideration Decision](#), ICC-01/13-34, para. 45; [2014 Decision not to Investigate](#), ICC-01/13-6-AnxA, para. 140.

Mavi Marmara after their arrival in Israel reasonably suggests a certain degree of sanctioning of the unlawful conduct; and (iii) the Prosecutor failed to recognise that the ‘unnecessarily’ cruel treatment of the passengers of the *Mavi Marmara*, the attempt of the IDF forces to conceal the crimes and the absence of crimes on other vessels of the flotilla were compatible with the hypothesis that the alleged crimes were planned.¹⁶⁶

2. 2019 Decision not to Investigate

85. The Prosecutor accepts that the alleged crimes may have been carried out pursuant to a plan or policy, but submits that such a plan or policy existed only among some of the IDF troops who took part in the boarding of the *Mavi Marmara*.¹⁶⁷ The Prosecutor’s assessment in this regard is based on the following considerations: (i) information available to her appears to be inconsistent with the existence of a plan or policy to commit the alleged crimes, or at least inconsistent with the existence of a plan or policy that was widely accepted among IDF soldiers, beyond those directly implicated;¹⁶⁸ (ii) there is no information that rationally and adequately links the alleged mistreatment of the passengers of the *Mavi Marmara* on Israeli territory with the alleged crimes on board the vessel;¹⁶⁹ (iii) the ‘excessive’ use of force aboard the *Mavi Marmara* is already captured in the legal qualification of the crimes;¹⁷⁰ (iv) the attempt of IDF forces to conceal the crimes is equally consistent with the existence of a plan or policy as it is with efforts to cover up spontaneous criminal acts;¹⁷¹ and (v) the absence of crimes on other vessels is equally consistent with the existence of a plan or policy as it is with the spontaneous occurrence of the alleged crimes in response to the violent resistance of the passengers of the *Mavi Marmara* to the IDF boarding.¹⁷² For these reasons, the Prosecutor has accorded limited weight to the manner of commission of the alleged crimes.¹⁷³

¹⁶⁶ [Reconsideration Decision](#), ICC-01/13-34, paras 34-36, 38, 41, 43-45.

¹⁶⁷ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 65-69, 89, 94.

¹⁶⁸ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 65, 69, 89, 94.

¹⁶⁹ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 79.

¹⁷⁰ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 86.

¹⁷¹ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 87.

¹⁷² [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 88.

¹⁷³ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 94.

3. *Application for Judicial Review*

86. The Comoros submits that the Prosecutor has not genuinely reconsidered her decision and has committed the same errors again. More specifically, the Comoros submits that the Prosecutor: (i) has disregarded or refused to take into account relevant evidence of live fire before any boarding of the ship and evidence of cruel treatment of the passengers of the *Mavi Marmara* in Israel;¹⁷⁴ (ii) has relied on the existence of conflicting accounts to lower the weight of the evidence of live fire and of alleged concealment of the crimes;¹⁷⁵ (iii) has prematurely determined that the events on board the *Mavi Marmara* were unconnected to those on Israeli territory;¹⁷⁶ and (iv) has failed to address the Chamber's direction with regard to the 'excessive' use of force aboard the *Mavi Marmara* and the alleged commission of crimes on other vessels of the flotilla.¹⁷⁷

4. *Victims' Responses*

87. The Victims concur with the Comoros and submit that the Prosecutor has not properly reconsidered her decision. More precisely, they argue that the Prosecutor has disregarded victims' statements that clearly and consistently indicate that live fire was used before boarding, as well as evidence of unnecessary cruel treatment and crimes committed on other vessels. The Victims add that the Prosecutor's revised position is 'nothing but window-dressing', as the Prosecutor has failed to apply the standard of proof as interpreted by the Chamber.¹⁷⁸

5. *Determination of the Chamber*

i. Was the Prosecutor bound to follow the Chamber's direction

88. The Chamber finds that the Prosecutor was bound by the Chamber's direction in part. The Chamber observes that its directions with regard to all five issues – the use of live fire, the alleged mistreatment of the passengers of the *Mavi Marmara* on

¹⁷⁴ [Application for Judicial Review](#), ICC-01/13-100, paras 85-86, 93-97.

¹⁷⁵ [Application for Judicial Review](#), ICC-01/13-100, paras 91, 101; [Comoros Reply](#), ICC-01/13-110, para. 20.

¹⁷⁶ [Application for Judicial Review](#), ICC-01/13-100, para. 98.

¹⁷⁷ [Application for Judicial Review](#), ICC-01/13-100, para. 100.

¹⁷⁸ [OPCV Response](#), ICC 01/13-107, paras 29-32, 37; [LRVs Response](#), ICC-01/13-108, paras 67-83.

Israeli territory, the excessive use of force, the alleged attempts to conceal the crimes and the absence of crimes on other vessels – revolve around the interpretation of the ‘reasonable basis to believe’ standard. In relation to the use of live fire, the Chamber found that the Prosecutor erred in setting this information aside because of the existence of conflicting accounts.¹⁷⁹ In relation to the remaining issues, the Chamber held that the Prosecutor erred in not recognising that the facts were consistent with both the existence of a plan or policy and the hypothesis that the alleged crimes were the result of individual excesses. The Chamber held that in the presence of several plausible explanations, the Prosecutor was duty bound to open an investigation.¹⁸⁰ Thus, the Prosecutor was obliged to reconsider her decision by applying the standard of proof as interpreted by the Chamber.¹⁸¹ However, the Prosecutor was not bound by the Chamber’s direction to the extent that it instructed her to reach particular factual findings or conclusions in relation to the five issues concerned.¹⁸²

ii. Has the Prosecutor properly reconsidered her decision

89. The Chamber finds that the Prosecutor has failed to correct the errors identified by the Chamber.

90. Regarding to the use of live fire, the Prosecutor acknowledges that accounts of the use of live fire prior to boarding are not manifestly false and accepts, on this basis, that a plan or policy may have existed.¹⁸³ However, she argues further that conflicting accounts and information inconsistent with the existence of a plan or policy suggest that such a plan or policy was confined to only some of the IDF troops who took part in the boarding operation.¹⁸⁴ The limited scope of the plan or policy then leads her to assign limited weight in the gravity assessment to the manner of commission of the alleged crimes.¹⁸⁵

¹⁷⁹ [Reconsideration Decision](#), ICC-01/13-34, para. 35.

¹⁸⁰ [Reconsideration Decision](#), ICC-01/13-34, paras 38, 41, 43, 44.

¹⁸¹ [Appeals Chamber’s Judgment](#), ICC-01/13-98, paras 78, 80.

¹⁸² [Appeals Chamber’s Judgment](#), ICC-01/13-98, paras 80, 92 and footnote 156.

¹⁸³ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 62-63.

¹⁸⁴ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 65-69. The information in question relates to the commission of the alleged crimes in the context of the violent resistance of the passengers of the *Mavi Marmara* to the boarding, the gradual use of force by the IDF, the use of less-lethal weapons and efforts to provide medical treatment.

¹⁸⁵ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 94.

91. The Chamber observes, at the outset, that a policy which existed only among some of the IDF members who boarded the vessel, not going beyond the direct perpetrators, is in fact not a policy. Be that as it may, the Chamber notes that the Prosecutor relies on the existence of unclear and conflicting accounts to assign less weight to the possibility that the crimes were committed pursuant to a plan or policy. This is in contradiction with the *Chamber's* interpretation of the standard as the Prosecutor is essentially assigning less weight to findings that do not conform to *her own* interpretation of the standard. The Chamber recalls that the Prosecutor is obliged to adopt the Chamber's interpretation of the applicable law.¹⁸⁶ Her approach in assigning less weight for the purpose of the gravity assessment to factual findings that do not conform to her own interpretation of the standard amounts to a failure to follow the Chamber's interpretation and direction, and constitutes an abuse of her prerogative to evaluate the available information and apply the law to the facts.¹⁸⁷

92. Turning to the alleged mistreatment of the passengers of the *Mavi Marmara* on Israeli territory, the Prosecutor submits that she has not applied the standard of proof to this issue because there is no information that adequately and rationally links the events on the *Mavi Marmara* with those on Israeli territory.¹⁸⁸ The Chamber finds that the Prosecutor was misguided on this point. She is obliged to apply the standard to *any and all* issues that require her determination. In this regard, the Chamber notes that all alleged perpetrators were in the service of the Israeli Government and the Prosecutor should have considered whether this information (together with any other information in her possession) established a reasonable basis to believe that the alleged crimes were committed pursuant to a plan or policy.

93. Turning to the remaining issues – namely, the excessive use of force, the alleged concealment of the crimes and the absence of crimes on other vessels – the Prosecutor submits that she does not need to consider whether these facts suggest that the plan or policy was wider in scope, nor does she need to assign said plan or policy more weight, because these facts are 'equally consistent' with both the spontaneous

¹⁸⁶ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 78.

¹⁸⁷ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 80.

¹⁸⁸ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 79.

occurrence of the alleged crimes and the existence of a plan or policy.¹⁸⁹ Once again, the Prosecutor relies on the existence of several plausible explanations to assign less weight to the possibility that the crimes were committed pursuant to a plan or policy, in direct contradiction to the standard of proof as established by the Chamber.

94. In light of the above, the Chamber finds that the Prosecutor has not *genuinely* reconsidered her decision, failing to apply the ‘reasonable basis to believe’ standard as interpreted by the Chamber.

F. Overall assessment of gravity

95. The Chamber notes, *first*, that the Prosecutor has committed a further new error in her overall assessment of gravity by applying the gravity requirement in a manner that is inconsistent with its object and purpose. The Prosecutor submits that her gravity assessment was informed, *inter alia*, by the selective mandate of the Court, *i.e.* the idea that the Court ‘cannot, and should not, seek to address every criminal allegation brought to its attention’.¹⁹⁰

96. The Chamber notes that the Prosecutor’s argument regarding the selective mandate of the Court is not reflected anywhere in the Statute or the Rules. Further, this statement reveals a misunderstanding of the object and purpose of the gravity requirement. The Chamber recalls that the purpose of the gravity requirement under article 17(1)(d) of the Statute is not to oblige the Court to select the most serious cases, but to oblige it not to prosecute cases of *marginal gravity*.¹⁹¹ According to the Appeals Chamber, the gravity requirement has an ‘exclusionary nature’, in that it is meant to ‘exclude from the purview of the Court those rather unusual cases when conduct that technically fulfils all the elements of a crime under the Court’s jurisdiction is nevertheless of marginal gravity only’.¹⁹² Therefore, gravity under article 17(1)(d) of the Statute is not a criterion for the *selection* of the most serious

¹⁸⁹ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 79.

¹⁹⁰ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, paras 95-96; *see also* [Prosecutor’s Response](#), ICC-01/13-109, para. 4 (referring to ‘the Prosecutor’s implicit duty to be a good steward of the limited resources of her Office’), para. 28.

¹⁹¹ [Al Hassan Admissibility Judgment](#), ICC-01/12-01/18-601-Red, paras 53, 59; [Al Hassan Admissibility Decision](#), ICC-01/12-01/18-459-tENG, para. 50.

¹⁹² [Al Hassan Admissibility Judgment](#), ICC-01/12-01/18-601-Red, paras 53, 59.

situations and cases, as argued by the Prosecutor, but a requirement for the *exclusion* of (potential) cases of *marginal gravity*.

97. The Chamber recalls that, according to the established jurisprudence of the Court, gravity at the situation stage (and admissibility, in general) is assessed against ‘potential cases’ arising from a situation.¹⁹³ The assessment concerns the gravity of potential cases, not the gravity of the situation. Thus, if a situation gives rise to at least one potential case that is not of marginal gravity, the requirements of articles 53(1)(b) and 17(1)(d) of the Statute are met. The fact that a situation may give rise to only one case does not detract from this conclusion. The Chamber recalls in this regard that the first *Situation in the Central African Republic* has, so far, given rise to only one case concerning article 5 crimes.

98. *Second*, the Chamber observes that the Prosecutor has not applied the gravity requirement in a consistent manner. The Prosecutor submits that ‘the assessment of gravity is fact-sensitive’ and that ‘analogies between cases or potential cases will rarely be helpful or instructive’.¹⁹⁴ While gravity must indeed be assessed on a case-by-case basis, considering all the relevant quantitative and qualitative criteria,¹⁹⁵ this does not mean that the gravity requirement cannot or should not be applied with consistency across cases and potential cases before the Court.

99. In this regard, the Chamber recalls three cases of comparable or lesser gravity than the potential cases arising from the present situation which have been considered to be of sufficient gravity to warrant further action by the Court. The first is the case of *The Prosecutor v. Bahr Idriss Abu Garda*, which concerned an alleged attack on 29 September 2007 on the Military Group Site Haskanita (‘MGS Haskanita’) belonging to the African Union Mission in Sudan (‘AMIS’). According to the Prosecutor, the attack allegedly resulted in the death of 12 AMIS peacekeeping personnel, 8 victims of attempted murder and the pillaging of MGS Haskanita. The attack further led to the suspension and ultimate reduction of AMIS operations in the area.¹⁹⁶ The case was found by the Chamber, in a previous composition, to be of

¹⁹³ See para. 18 above.

¹⁹⁴ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 90.

¹⁹⁵ [Al Hassan Admissibility Judgment](#), ICC-01/12-01/18-601-Red, para. 2.

¹⁹⁶ [Abu Garda Confirmation of Charges Decision](#), ICC-02/05-02/09-243-Red, paras 21, 33.

sufficient gravity to be admissible before the Court.¹⁹⁷ The Prosecutor brought a second case concerning the same events, the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain*, which is currently pending before the Court.¹⁹⁸ Thirdly and most notably, the Chamber recalls the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*. Mr Al Mahdi was convicted in 2016 for the destruction of nine mausoleums and the door of one mosque in Timbuktu, constituting the war crime of attacking buildings dedicated to religion and historic monuments (article 8(2)(e)(iv) of the Statute).¹⁹⁹ The Chamber notes that Mr Al Mahdi was convicted of crimes against property, which according to the Court's jurisprudence are 'generally of lesser gravity than crimes against persons'.²⁰⁰ Qualitative considerations, such as the fact that the buildings were UNESCO World Heritage sites,²⁰¹ do not alter this distinction between crimes against property and crimes against persons and the inherent heightened gravity of the latter.

100. In the present situation, the potential case(s) involve(s) the wilful killing of 10 civilians, wilfully causing serious injury to 50-55 others and possibly hundreds of instances of outrages upon personal dignity, or torture or inhumane treatment. The number of victims registered to participate in the proceedings is close to 500.²⁰²

101. The Prosecutor's failure to apply the gravity requirement with consistency across cases and potential cases before the Court opens the Court up to criticism of double-standards and arbitrariness.²⁰³ The Chamber recalls that the conditions of

¹⁹⁷ [Abu Garda Confirmation of Charges Decision](#), ICC-02/05-02/09-243-Red, paras 33-34.

¹⁹⁸ Pre-Trial Chamber I, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Summons to Appear for Abdallah Banda Abakaer Nourain](#), 27 August 2009, ICC-02/05-03/09-3-RSC (proceedings against Mr Saleh Mohammed Jerbo Jamus were terminated following his passing).

¹⁹⁹ Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, [Judgment and Sentence](#), 27 September 2016, ICC-01/12-01/15-171, para. 63.

²⁰⁰ Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, [Judgment and Sentence](#), 27 September 2016, ICC-01/12-01/15-171, para. 77; Trial Chamber II, *The Prosecutor v. Germain Katanga*, [Décision relative à la peine \(article 76 du Statut\)](#), 23 May 2014, ICC-01/04-01/07-3484, para. 43.

²⁰¹ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 92 and footnote 146.

²⁰² [LRVs Response](#), ICC-01/13-108, paras 42-43. See [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 127(vi), where the Appeals Chamber held that: 'The number of participating victims provides an indication of the scope of victimhood and the number of victims is one of the relevant considerations in the assessment of the gravity requirement for the purposes of article 17(1)(d) of the Statute'.

²⁰³ See for example [LRVs Response](#), ICC-01/13-108, paras 7-9, 14, 35.

article 53(1)(a) and (b) of the Statute are ‘exacting legal requirements’.²⁰⁴ If met, article 53(1) of the Statute dictates that the Prosecutor ‘shall’ open an investigation. The Prosecutor does not have discretion to decline to initiate an investigation when the requirements of article 53(1)(a) and (b) of the Statute are met, unless she determines that an investigation would not serve the interests of justice (article 53(1)(c) of the Statute).²⁰⁵

G. Conclusion

102. In light of the above, the Chamber finds that the Prosecutor has not *genuinely* reconsidered her decision. The Prosecutor has: (i) failed to apply the ‘reasonable basis to believe’ standard as interpreted by the Chamber;²⁰⁶ (ii) made premature determinations with regard to the scope of the potential cases and the nature and extent of the victimisation;²⁰⁷ (iii) failed to take into account factors and/or information relevant to the gravity assessment as instructed by the Chamber;²⁰⁸ and (iv) relied on considerations that are not relevant to the gravity assessment or to the specific factor concerned.²⁰⁹

103. The Chamber notes that the interpretation of the ‘reasonable basis to believe’ standard has been at the centre of these proceedings from the outset and has been a contentious issue throughout. After the Chamber found in its Reconsideration Decision that the Prosecutor had applied an incorrect interpretation of the standard,²¹⁰ the Prosecutor refused outright to apply the Chamber’s interpretation of the standard in her 2017 Decision not to Investigate, submitting that she disagreed with it.²¹¹ This position was later found by the Appeals Chamber to have been incorrect, as the Prosecutor was obliged to apply the Chamber’s interpretation of the law.²¹² Now, in the 2019 Decision not to Investigate, the Prosecutor acknowledges that she is bound to apply the Chamber’s interpretation of the evidentiary standard, but relies on

²⁰⁴ [Reconsideration Decision](#), ICC-01/13-34, para. 14.

²⁰⁵ [Reconsideration Decision](#), ICC-01/13-34, para. 14.

²⁰⁶ See paras 43, 61-63, 69, 90-94 above.

²⁰⁷ See paras 40-43, 67 above.

²⁰⁸ See paras 64-66, 78-80 above.

²⁰⁹ See paras 39, 44, 68-70, 81-82, 95-97 above.

²¹⁰ [Reconsideration Decision](#), ICC-01/13-34, paras 13, 35-36.

²¹¹ [2017 Decision not to Investigate](#), ICC-01/13-57-Anx1, para. 15 *et seq.*

²¹² [Appeals Chamber’s Judgment](#), ICC-01/13-98, paras 86-90.

a lack of clarity in the available information and the existence of several plausible explanations to argue that certain factors should receive less weight.²¹³ This approach is contrary to the ‘reasonable basis to believe’ standard as interpreted by the Chamber. The Prosecutor’s resistance to adopt the standard as interpreted by the Chamber is further apparent from her submission that:

While the Prosecution has duly accepted [the] legal interpretations of the majority of the Pre-Trial Chamber [...] for the purpose of *this* situation, it notes that this remains without prejudice to its approach in other situations. [...] In particular, [...] the Prosecution [...] respectfully maintains its view for all other purposes that the standard of proof in article 53(1) (“reasonable basis to believe”) should be applied to the *legal elements* required by articles 53(1)(a) and (b), evaluating and weighing the information made available *as a whole*. This was one of the grounds on which the Prosecution sought to appeal the legal interpretations of the majority of the Pre-Trial Chamber (in 2015), and the Appeals Chamber never ruled on the merits of this question.²¹⁴

104. The Chamber further notes that the Prosecutor has, on several occasions, abused her margin of appreciation by relying on considerations that are not relevant to the gravity assessment. When the Chamber directs the Prosecutor to take into account a certain factor or information relevant to the gravity assessment, the Prosecutor is obliged to do so and she may not rely on considerations that are not relevant to the gravity requirement to assign less weight to factors that *are* relevant. Such an approach undermines the Chamber’s power to request the Prosecutor to take into account certain factors and/or information. It also risks locking the Prosecutor and the Chamber in a perpetual cycle of review and reconsideration, defeating the purpose of article 53(3)(a) proceedings.

V. Whether the Chamber may request reconsideration

105. The Chamber recalls the Appeals Chamber’s pronouncement that, when requesting the Prosecutor to reconsider her decision not to proceed with an investigation pursuant to article 53(3)(a) of the Statute, the Chamber may only direct the Prosecutor: (i) as to the interpretation of the applicable law; (ii) to consider certain available information; or (iii) to consider certain factors or information related thereto

²¹³ See paras 43, 68-70, 90-94 above.

²¹⁴ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, footnote 20 (emphasis in the original).

in the assessment of the gravity of the potential cases. The Chamber may not direct the Prosecutor as to: (i) how to apply the law to the available information; (ii) how she should analyse the available information and what factual findings to make; and (iii) what weight she should attach to the different factors relevant to the gravity assessment.²¹⁵

106. For the reasons that follow, the Chamber decides not to request the Prosecutor to reconsider her 2014 Decision not to Investigate, notwithstanding the Chamber's finding that the 2019 Decision not to Investigate is not the result of a genuine reconsideration.

107. *First*, it is unclear to the Chamber, based on the guidance received from the Appeals Chamber, whether and to what extent it may request the Prosecutor to correct errors related to questions of law and the application of the law to the facts. The Prosecutor submits in the 2019 Decision not to Investigate that she has accepted and applied the legal interpretations adopted by the Chamber in the Reconsideration Decision, including the Chamber's interpretation of the evidentiary standard.²¹⁶ In this regard, the 2019 Decision not to Investigate differs from the 2017 Decision not to Investigate, where the Prosecutor submitted that she disagreed with the Chamber's interpretation of the standard.²¹⁷ Yet, the Prosecutor has committed several errors concerning questions of law by: (i) applying the 'reasonable basis to believe' standard in a manner which is inconsistent with the Chamber's interpretation of the standard;²¹⁸ and (ii) assessing factors in a manner that is contrary to the object and purpose of article 53(1) of the Statute (and the Prosecutor's obligation under article 54(1)(a) of the Statute).²¹⁹

108. In the present proceedings (and in any situation where the Prosecutor does not refuse outright to apply the Chamber's interpretation of the law), questions of law are inextricably linked to the application of the law to the facts. This is particularly true with regard to the evidentiary standard, where the Chamber can only determine

²¹⁵ [Appeals Chamber's Judgment](#), ICC-01/13-98, para. 82.

²¹⁶ [2019 Decision not to Investigate](#), ICC-01/13-99-Anx1, para. 14 and footnote 20; *see also* paras 60-61.

²¹⁷ [2017 Decision not to Investigate](#), ICC-01/13-57-Anx1, para. 15 *et seq.*

²¹⁸ *See* paras 43, 61-63, 69, 90-94 above.

²¹⁹ *See* paras 40-42, 67 above.

whether the Prosecutor has adopted the Chamber's interpretation of the standard by reviewing how she has applied it to the facts. If the Prosecutor fails to apply it correctly, the Chamber has to direct her on how to apply the law to the facts. For instance, the Chamber found that, when considering whether there was a reasonable basis to believe that the passengers of the *Mavi Marmara* were denied medical treatment, the Prosecutor failed to apply the evidentiary standard as interpreted by the Chamber because she relied on a lack of clarity in the available information and the existence of conflicting accounts and alternative explanations.²²⁰ In requesting the Prosecutor to reconsider her decision on this point, the Chamber would have to direct her not to rely on such lack of clarity or the existence of conflicting accounts, thereby directing her as to how to apply the standard to the facts.

109. This issue is further compounded by the manner in which the Prosecutor has, at times, used the evidentiary standard. The Chamber recalls that the Prosecutor has relied on an incorrect interpretation of the standard not only in her findings of fact, but also in her assessment of the weight to be attached to the different factors. The Prosecutor has attached less weight to certain factors where several plausible explanations existed or uncertainties persisted as to the precise course of events.²²¹ Here, questions of law and the application of the law to the facts are intertwined with questions related to the weight that the Prosecutor should attach to the different factors. This leads the Chamber to its next point.

110. *Second*, it is unclear to the Chamber, based on the guidance received from the Appeals Chamber, whether and to what extent it may request the Prosecutor to correct errors related to her assessment of the factors relevant to the gravity requirement. In the present proceedings (and in any situation where the Prosecutor does not refuse outright to take into account a certain factor or information identified by the Chamber), the question of whether the Prosecutor has properly considered the relevant factors and *genuinely* taken them into account, as instructed by the Chamber, depends on whether she has afforded said factors the proper weight. This is particularly apparent in the present proceedings where the Prosecutor has assigned limited weight to several factors based on erroneous considerations by: (i) relying on

²²⁰ See paras 61-63 above.

²²¹ See paras 69, 90-94 above.

considerations that are not relevant to the gravity requirement or to the factor concerned;²²² (ii) making premature assessments as to the scope of the potential cases and the scope of the victimisation;²²³ (iii) relying on the existence of several plausible explanations or uncertainties, inherent at this stage of the proceedings;²²⁴ and (iv) attaching ‘neutral significance’ to certain factors or considerations, or failing to show how she has taken into account certain factors or considerations.²²⁵

111. For these reasons, the Chamber decides not to request the Prosecutor to reconsider her decision. The Chamber considers that the current jurisprudence of the Appeals Chamber does not establish with sufficient clarity the exact distribution of prerogatives between the Prosecutor and the pre-trial chamber in article 53(3)(a) proceedings. The Chamber notes with concern that in the present proceedings the Prosecutor has interpreted the Appeals Chamber’s Judgment in a manner that undermines both the Chamber’s power to direct the Prosecutor as to the correct interpretation of the law and its power to order the Prosecutor to take into account in the gravity assessment certain factors and/or information, thereby negating the effectiveness of the procedure under article 53(3)(a) of the Statute.

112. Finally, the Chamber notes the Comoros’ request that the Chamber take appropriate steps to ensure that the Prosecutor does not fail again to comply with the Chamber’s and the Appeals Chamber’s directions.²²⁶ Considering the above, the Chamber finds this request to be moot.

²²² See paras 39, 44, 68-70, 81-82, 95-97 above.

²²³ See paras 40-43, 67 above.

²²⁴ See paras 68-70, 90-94 above.

²²⁵ See paras 64-66, 78-80 above.

²²⁶ [Application for Judicial Review](#), ICC-01/13-100, paras 105, 110-112, 131.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Application for Judicial Review.

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



Judge Péter Kovács, Presiding Judge



Judge Marc Perrin de Brichambaut



**Judge Reine Adélaïde Sophie
Alapini-Gansou**

Dated this Wednesday, 16 September 2020

At The Hague, The Netherlands