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Date: **29 January 2015**

**PRE-TRIAL CHAMBER I**

**Before:** **Judge Silvia Fernández de Gurmendi, Presiding Judge**
**Judge Ekaterina Trendafilova**
**Judge Christine Van den Wyngaert**

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

**Public Redacted Version with Confidential Annexes 1, 2 and 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**

**Source:** **Sir Geoffrey Nice QC, Rodney Dixon QC, and KC Law (London) on behalf of the Government of the Union of the Comoros**

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

**The Office of the Prosecutor**
Ms. Fatou Bensouda, Prosecutor

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of the Applicant**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

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

**States Representatives**
Sir Geoffrey Nice QC
Rodney Dixon QC

**Amicus Curiae**

**REGISTRY**

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**Registrar**
Mr. Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

**INTRODUCTION**

1. Counsel for the Government of the Union of the Comoros ("the Applicant State Party" or "Applicant") files this Application on behalf of the Applicant State Party for the Pre-Trial Chamber to review the Decision of the Prosecutor of 6 November 2014 ("the Decision") [1] not to open an investigation into the attack on the "Gaza Freedom Flotilla" ("the Flotilla") that was the subject of the State Referral by the Comoros pursuant to Article 14(1) of the Statute.

2. The Application is submitted pursuant to Article 53(3)(a) of the Statute. The Prosecutor accepts that the Applicant State Party is entitled to submit an application for her decision to be reviewed on the basis of Article 53(3)(a).[2]

3. The Union of the Comoros has been a State Party of the ICC since 1 November 2006. As a State Party it referred the present Situation to the Prosecutor for investigation pursuant to Article 14(1) of the Statute. It is common ground that a vessel that was part of the Flotilla, the Mavi Marmara, was registered to the Comoros at the time of the attack and that the Court could thus exercise jurisdiction over crimes committed on the board this vessel and two other vessels in the Flotilla registered in the name of States Parties (Greece and Cambodia) irrespective of the nationalities of the alleged perpetrators or victims.[3]

4. In the Decision the Prosecutor has, however, found that although there is a reasonable basis to believe that crimes within the ICC's jurisdiction were committed by the Israeli Defence Forces ("IDF") on board the Mavi Marmara and the other two vessels, "the information available does not provide a reasonable basis to proceed with an investigation of the situation … pursuant to the requirement in article 17(1)(d) of the Statute that cases shall be of

[1] Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, 6 November 2014 (hereinafter "The Decision").
[2] The Decision, para. 152. The OTP's Decision "*notes that as the referring State, the Comoros, may request the Pre-Trial Chamber to review the Prosecutor's decision not to proceed with an investigation, pursuant to article 53(3)(a).*"
[3] The Decision, paras. 3, 14.

sufficient gravity to justify further action by the Court". The Prosecutor has determined that the jurisdictional guidelines of Article 8(1) ("part of a plan or policy" or "of a large-scale commission of such crimes") have not been satisfied in respect of the potential cases that could arise from any investigation and that they would not be of sufficient gravity to justify the ICC's attention.

5. It is this determination that the Applicant requests the Pre-Trial Chamber to review in accordance with its powers under Article 53(3)(a).

**REQUEST TO RECONSIDER THE DECISION: OVERVIEW OF GROUNDS OF REVIEW**

6. The Applicant State Party respectfully requests that the Pre-Trial Chamber should direct the Prosecutor to reconsider the Decision that there is no reasonable basis to believe that the Situation is of a sufficient gravity to initiate an investigation. There are cogent grounds for requiring the Prosecutor to reconsider her decision in light of all available information when the *correct* legal standards are applied. These grounds are explained in detail below.

7. The Applicant submits that the interests of justice and fairness, which are the core of the ICC's mandate, strongly militate in favour of the Prosecutor reconsidering her decision. Impunity for all those involved - from top politicians and military leaders to the individual soldiers shooting dead ten unarmed passengers on the Mavi Marmara and committing grave offences against hundreds of other passengers, all on the high seas - will be the inevitable result of the Prosecutor refusing to investigate these alleged international crimes, which she has a reasonable belief were committed. There is no suggestion from Israel that any of those committing these crimes has been investigated, is being investigated or will be investigated. There have been no effective national investigations and no prosecutions in Israel of top political and military leaders whose decisions about the Israel-Gaza conflict have led to the events under consideration and to other antecedent

and subsequent military interventions that have caused great loss of life to non-Israeli citizens. The Prosecutor's decision will thus lead to instant impunity for those immediately involved, but set within a broader impunity for Israel that, it may be accepted by the Pre-Trial Chamber, increasingly disturbs the conscience of the world. The Chamber is urged to direct the Prosecutor to reconsider her decision in light of the fundamental and seminal legal issues and in light of the grave factual issues identified in this Application.

8. It is the Applicant's submission that the Prosecutor should be directed to reconsider the Decision because she has disregarded the law in failing to apply correctly the relevant legal standard of proof (and lowest of all ICC legal tests) of 'a reasonable basis to believe' which determines when to open an investigation. She has also failed to attend to facts - identified below - that reveal the true gravity of the Situation. By requesting the Prosecutor to reconsider the Decision, the Pre-Trial Chamber can guarantee - for victims, the rule of law and the reputation of the ICC itself - that the first filtering process by which factual situations *are* admitted into ICC consideration is not coarsened to become an unnecessary obstacle to a proper State Party's referral.

**Failure to apply the overriding legal standard**

9. The 'reasonable basis to believe' test that crimes have been committed does not mean that charges will be brought. As Article 14(1) makes clear, deciding whether to charge someone is the purpose of the investigation itself, in the course of which available evidence is collected and examined.[4] By failing to agree even to open an investigation in which evidence could be properly considered the Prosecutor has denied herself the opportunity to investigate whether any individuals should be considered for charge. She has done this in a Situation where the lack of 'gravity' on which she relies for her

[4] Rome Statute, Article 14(1) provides that: "*A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes*." (emphasis added).

decision could be very substantially affected by evidence on which detailed findings about the states of mind of individual possible perpetrators - at any of the levels of command implicated in the attack on the Flotilla - could become available *in* the investigation. For example, should evidence become available about the real states of mind of those in leadership positions who commissioned this attack it might be found that the motivation was far from the protection of Israel but rather an intention to shut down public opposition or to restrict freedom of speech or simply to teach people of certain ethnicities a lesson of heavy-handed and cruel dissuasion. Any of these findings would raise the gravity 'index' of what was done, even in and for the Prosecutor's eyes. It has to be borne in mind that the Israel-Gaza conflict, and all of its manifestations, generate questions of discrimination and may reveal the worst forms of discriminatory behaviour, something eminently appropriate for the ICC to have at the forefront of its work.

10. As accepted by the Prosecutor, her decision about opening an investigation can make allowance for the fact that the available information need not be comprehensive nor point towards only *one* conclusion.[5] Her decision on this information is not binding on any future investigation and is without prejudice to the outcome of any later detailed investigation in which she may exercise the full extent of her investigative powers and resources. In this Situation the Prosecutor has noted that she need not conclusively decide at this stage whether the blockade of Gaza by Israel and the IDF was lawful or not on the facts and as a matter of law.[6] This would be a matter for the investigation itself, if initiated.

11. The Prosecutor has also accepted that for present purposes the Prosecution can regard the situation as one of occupation by Israel of Gaza (even though Israel disagrees with this view) in order to determine whether there is a reasonable basis to believe that crimes within the ICC's jurisdiction were committed on board the vessels over which the Prosecutor has jurisdiction.[7]

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[5] The Decision, para. 4.
[6] The Decision, para. 18.
[7] The Decision, paras. 28-29.

12. These few accurate reflections of the law by the Prosecutor have not, unfortunately, been accompanied by comprehensive and consistent application of the correct legal standard in assessing all aspects, including the gravity, of the alleged crimes. Despite this running error that permeates the entire Decision, the Prosecutor has reached definitive findings on many legal and factual issues and allowed these findings to lead her to refuse to open an investigation.

**Disregard of the relevant pre-conditions and contextual requirements for the exercise of jurisdiction at the Preliminary Examination stage**

13. The findings made by the Prosecutor in respect of the occupation and the blockade (as noted above) for the purpose of establishing that there is a reasonable basis to believe that crimes within the ICC's jurisdiction were committed are critical. They indicate that the Prosecutor accepts that key factual and legal considerations that arise *beyond* what occurred on board the vessels of the Flotilla (and the particular vessels that are registered to ICC States Parties including the Applicant) are relevant to whether the acts that occurred *on* the Flotilla constitute crimes within the ICC's jurisdiction. These contextual and wider considerations may be critical to determining how the conduct on the vessels should be *characterised* and *classified* under International Humanitarian Law and the provisions of the Statute at this stage of the proceedings.[8]

14. The Prosecutor has no jurisdiction in the present Situation to charge persons for acts committed during the occupation and the blockade as a whole unless those acts occurred on the vessels concerned (absent an effective Declaration

[8] Even without these wider considerations, attacking blameless, unarmed civilians comprised largely of human rights activists could well qualify as sufficient to justify full investigation by the ICC if a gateway to jurisdiction were open, as it unquestionably is here. Although not the focus of this Application, it is important to recall how it may *only* be through the ICC that developing *international* human rights - including an *international* right to free speech, or a right to protest *internationally* or a right to provide aid to suffering humans other than through formally recognised NGOs, governments or international bodes - can be safeguarded. Failing to investigate this matter properly may discourage world citizens of good will from filling the many, and arguably increasing, gaps left by national and international institutions in the performance of their humanitarian duties.

by Israel or the Palestinian Authority to invoke ICC jurisdiction for other Situations but subject, of course, to the Preliminary Examination that she opened on 16 January 2015 into the Palestine Situation - which is addressed separately below). But the Prosecutor certainly *can* take account of all acts that occurred during the blockade and occupation in order to determine whether the acts on the vessels over which she has jurisdiction could constitute war crimes of sufficient gravity under the ICC's Statute in order to decide whether they should be investigated.

15. The wider occupation / conflict and the blockade are pre-conditions to the exercise of the Court's subject matter jurisdiction and the necessary contextual requirements for the conduct on board the vessels (over which the Court has territorial and temporal jurisdiction) to be charged as war crimes at the ICC. So too is the *gravity threshold* and the *guideline requirements of Article 8(1)* that the crimes should be committed as part of a plan or policy or as part of the large-scale commission of such crimes. It is a pre-condition to the Court exercising its jurisdiction. Acts occurring outside of the territorial and temporal jurisdiction of the Court can certainly be taken into account when considering whether the Court can exercise jurisdiction over conduct which is within its territorial and temporal jurisdiction and in order better to understand and to characterise such conduct (as the Prosecutor has done in respect of the occupation and blockade). There is an extensive body of case law from international criminal courts that clearly supports this position.[9] It is thus perfectly permissible for the Prosecutor to take into consideration the wider context of the blockade and the occupation and all acts committed in this context in order to determine whether there is a reasonable basis to believe that the conduct on the vessels over which the Prosecutor does have jurisdiction is sufficiently grave to proceed with an investigation i.e. to meet the gravity threshold and guideline requirements of Article 8(1) at this stage.

[9] As discussed below. See for example, *Prosecutor v. Nahimana et al*., Judgement, ICTR-99-52-A, 28 November 2007, para. 315; *Prosecutor v. Taylor*, SCSL-03-01-T, Judgement, 18 May 2012, paras. 98, 102; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, paras. 78-129; *Prosecutor v. Haradinaj et al*., Decision on Haradinaj's appeal on scope of partial retrial, IT-04-84bis-AR73.1, 31 May 2011, paras. 39-40.

The Prosecutor has failed to do so and failed to take the relevant case law into account. She should thus reconsider her decision.

16. These are two truths of fact and law overlooked or disregarded by the Prosecutor: If the blockade was unlawful in that it disproportionately targeted civilians or amounted to a collective punishment (as has been found to be the case by the ICRC and various UN bodies[10]) then *all* the acts that followed in enforcing the blockade would themselves be unlawful, especially if civilians were the subject of these actions. Where those unlawful acts also qualify as crimes within the jurisdiction of the ICC - as murders, other assaults, false imprisonments, acts of humiliation etc committed by the IDF - then there can be no possible justification for *not* starting an investigation.

17. It may well be that some will consider the passengers on the Flotilla to have been wearisome, 'do-gooders' of liberal persuasion who were needlessly interfering in the politics of the region. Such views plainly cannot influence the course of the Prosecutor's work. Those on the Flotilla are all entitled to the ICC's condemnation of impunity and to its sanctioning of individuals who might have hoped to enjoy impunity, as would be the armed forces of any nation State of the international community. The difference between those on the Flotilla and the armed forces of any State include that once the overall blockade is deemed unlawful - as it was and is, subject to a proper evidence-based finding otherwise by the Prosecutor - then the IDF has literally no viable defence as against the unarmed civilians on the Flotilla even if it might have in respect of any armed forces.

18. Further there is this distinct route to the inescapable necessity for the Situation referred by the Comoros to be properly investigated: When

[10] Report of the international fact-finding mission to investigate violations of international law, including international humanitiarian and human rights law, resulting from the Isreaeli attacks on the flotilla of ships carrying humanitarian assistance, UN Human Rights Council, A/HRC/15/21, 27 September 2010, paras. 38, 54 (hereinafter "UNHRC Report"). See also, John Dugard, Implementation of General Assembly resolution 60/251 of 15 march 2006 entitled "Human Rights Council", Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/4/17 29 January 2007 (http://unispal.un.org/UNISPAL.NSF/0/B59FE224D4A4587D8525728B00697DAA).

considering the blockade and all the operations undertaken to enforce the blockade, there would be a reasonable basis to believe, unless and until disproved by an evidence-based investigation, that the particular IDF operation to intercept the Flotilla formed part of a plan and policy to uphold the *unlawful* blockade and / or for the crimes committed on board of the vessels to be part of a larger-scale commission of similar crimes committed as part of that larger plan and policy. The Situation would manifest a higher gravity 'index' even than the index identified in the previous paragraphs. The guideline requirements of Article 8(1) for gravity would be satisfied to the 'reasonable basis to believe standard'. The Situation could not conceivably be said to lack sufficient gravity to establish a reasonable basis to proceed with an investigation.

19. On the basis of these two approaches the Prosecutor should have decided to open an investigation to examine the lawfulness of the blockade and the crimes on the vessels which form part of Israel's enforcement of the blockade.

**Failure to weigh all of the relevant factors in assessing the scale, nature, manner of commission and impact of the crimes**

20. Further, and in any event, the Prosecutor's findings regarding the scale, nature, manner of commission and impact of the crimes have ignored vital considerations. She has overlooked the key aggravating factors and has placed undue weight on what are said to be mitigating factors, insofar as there are any. Her indication that there are "limited countervailing qualitative considerations" is as unfounded as it is hard to understand and should be reconsidered in light of all available information.

21. The Prosecutor's view is that the victim's case in the present Situation is not as serious as the one against the Sudanese rebel commanders for a single attack on an African Union base in Darfur because the victims on the Flotilla were seeking to make a 'political' statement, failed to get the 'consent' of the IDF and did not 'co-operate'. It is submitted that this view is surprisingly

harsh and / or naïve and arguably revealing of deference to the perceived interests of the world's most powerful states. Faced with an unlawful blockade that was bringing suffering to hundreds of thousands of innocent civilians where the international community chose to do very little, why should concerned citizens seek the consent of the offending party before trying their best to alleviate suffering? Drawing parallels between this proposition and any similar proposition applied retrospectively to some of the world's most notorious and gravest crimes where selected nations or nationalities or ethnicities have been targeted for treatment that puts them at risk should embarrass the Prosecutor.

22. Moving beyond the *opening* of the attack on the Flotilla, the Prosecutor's view also completely overlooks how the IDF were shooting with live ammunition from helicopters at those on the Mavi Marmara *before* IDF troops boarded the vessels. Such aggressive, lethal violence could well have been part of an attack *intended from the start to murder unarmed civilians*, as happened. Without an evidence-based investigation by the Prosecutor leading to a contrary conclusion the most obvious inference must be that these crimes resulted from a plan or policy to target civilians. Such aggressive conduct is denied by the IDF, the armed force of a country that does not cooperate with the ICC let alone invoke its judicial function objectively to assess criminality on all sides in the Comoros Situation or in the newly opened Palestine Situation.[11] It is hard to assess what this denial may be worth. Less, certainly, than the obvious and natural inferences that it cannot displace, namely that the victims who were killed suffered the fate *intended* for them by the IDF.

23. Evidence of the attack provides, at the very least, a reasonable basis to believe that the IDF directed attacks against civilians which would be consistent with the Prosecutor's approach elsewhere in the Decision that evidence need not be conclusive and that the threshold to be crossed by any Prosecutor commencing an investigation is low. For a mighty armed force

[11] Israel has also declined to cooperate with the Commission of Inquiry established by the UNHRC that is due to report this March.

intentionally to attack and murder unarmed civilians on the high seas must aggravate, and by a very substantial amount, the already high index of gravity that the bare facts of this Situation support.

24. It is submitted that no reasonable jurist could justify any legal determination that the single attack on peacekeepers in a village in Darfur (without diminishing the seriousness of these crimes) was more serious, and thus more deserving of the ICC's attention in accordance with the provisions of the Statute, than the attack on the Flotilla. The IDF attack was allegedly perpetrated in order to uphold a blockade of Gaza that is widely regarded as being unlawful as part of a policy to punish collectively the civilians of Gaza in the context of Israel's occupation of, and control exercised over, this territory.

25. There are few who would regard the Israel-Palestine conflict as anything other than one of the most serious conflicts of our time, irrespective of what views may be held about the merits of the positions taken by the opposing sides. What happens in truly serious conflicts is to an extent *ipso facto* serious in a way likely to render alleged crimes during such conflicts automatically of a gravity meriting investigation. Any murder - and any 10 murders - are dreadfully serious to all those involved even if committed other than in an armed conflict. The same 10 murders committed in one of the world's gravest conflicts have the gravity of being a part of something much larger. They also have the gravity of what they may themselves lead to, particularly if not punished. For now, the commission of 10 killings in an unlawful way in battle may not worry the perpetrators and their commanders too much - they will be able to turn to the Prosecutor's decision in the realistic expectation that the ICC will not be interested. However, had the Prosecutor been timeous in reaching a decision about the Comoros Situation to the effect that she would investigate the Mavi Marmara deaths (and all other unlawful acts) it could have operated to deter the commission of further offences in the recent military operations in Gaza in the summer of 2014 in which some 2,200 were killed of which some 25% were children.

26. Indeed, the decision by the Prosecutor in the Sudan Situation to take into account the wider context and the deterrence considerations - that of peacekeeping in Darfur and the impact on the population generally (not just in the AU base where the crimes were committed) - in order to investigate this case shows that the Prosecutor is prepared to look at the relevant context of crimes she investigates. The Prosecutor should do so in the present Situation as well to be consistent in her treatment of different Situations.

27. A reconsideration ruling by the Chamber would also permit and perhaps stimulate the Prosecutor to use all procedural mechanisms that are available to her - and not just a selection - during a reconsidered preliminary examination. In this way she could obtain and review relevant information in order properly to determine whether there is a reasonable basis to proceed with an investigation in light of the gravity of the potential cases. The Applicant notes that the Prosecutor has not referred to a single witness statement or victim application that was submitted by the Applicant to the Prosecutor. She had been requested to use her powers to interview these witnesses at the seat of the Court pursuant to Rule 104(2).[12] Many of these witness statements recount harrowing evidence of being attacked at night on the high seas with live ammunition from helicopters, of excessively violent conduct by IDF soldiers boarding the vessels that resulted in killings, very serious injuries, brutal assaults, abuse and mistreatment at the hands of members of the IDF. The Prosecutor clearly has the power to receive this testimony in written or oral form under Rule 104(2).

28. Given that the evidence at this stage need not be conclusive witness evidence of the kind readily available and in considerable quantity must at the very least provide a reasonable basis to believe that serious crimes of sufficient gravity to warrant the ICC's attention were committed and that they are of similar gravity to certain other cases being tried at the ICC. It is inconceivable, taking into account the interests of justice and of the victims,

[12] Supplemental Submissions to the Prosecution on the Referral from the Union of the Comoros, 19 May 2014, paras. 3, 4 (hereinafter "Supplemental Submissions"). See also, Letter from KC Law Solicitors and Advocates to the Office of the Prosecutor, 8 October 2014.

that alleged conduct of this nature once the subject of witness evidence provided live to the Prosecutor's office, as it could and should have been, should not even be investigated by the ICC.

29. In light of the witness evidence, summarised below of witnesses readily available to be interviewed, the Chamber is invited to say it must require the Prosecutor to reconsider and to render a new decision which specifically takes this evidence into account and refers to the witness evidence.

**Reconsideration in light of the opening of the Palestine Situation**

30. Finally, there are good reasons for the Prosecutor to re-examine the present Situation in light of the Situation on Palestine that has just been opened. This is a new development and a fact that post-dates the Decision of 6 November 2014 which permits the Prosecutor to reconsider her decision pursuant to Article 53(4).[13]

31. Given that the Prosecutor now *has* jurisdiction over another part of the occupation of Gaza and conflict between Israel and Palestine from 13 June 2014 and onwards, and has opened a Preliminary Examination into this Situation[14], the Prosecutor can on her own reasoning take into account acts committed in this later period of time to determine whether they are related to the crimes committed by the same forces on the Flotilla in the same occupation and conflict, and whether all of these circumstances taken together establish on a 'reasonable basis to believe' that the Flotilla Situation is sufficiently grave to warrant investigation.

32. For all of these reasons and those set out hereunder, the Applicant State Party respectfully asks the Chamber to request the Prosecutor to reconsider her decision not to open an investigation by taking all relevant matters into

[13] Rome Statute, Article 53(4) provides: "*The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information*."
[14] Press Release: The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015 (http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx).

consideration when properly applying the legal standard of a 'reasonable basis to believe' at this preliminary stage of the proceedings.

## BACKGROUND TO THE REVIEW

33. On 14 May 2013, the Office of the Prosecutor received a Referral from the Union of the Comoros pursuant to Article 12(2)(a) and Article 14 of the Statute.[15] The Referral requested that the Prosecutor initiate an investigation into the crimes allegedly committed within the Court's jurisdiction arising from the attack by the IDF on 31 May 2010 on the Flotilla bound for Gaza. The Prosecutor was provided with extensive video and photographic evidence of the attack, as well as with several victim statements, and forensic scientific and legal reports. The Referral and the annex of materials filed are attached hereto as Annex 1.[16]

34. On 9 May 2014, nearly a year after the Referral was submitted to the OTP, the legal team for the Government of the Comoros met with the Prosecutor and OTP staff in order to request an update on the Prosecutor's consideration of whether to open an investigation. The Prosecution raised certain concerns at the meeting about apparently conflicting evidence and accounts of the attack. In response, Counsel for the Comoros emphasised that according to the jurisprudence of the Court and the Prosecutor's Policy on Preliminary Examinations, the evidence submitted "should be taken at its 'highest' at this stage of the proceedings" and that it is "neither expected to be 'comprehensive' nor 'conclusive'" in order to open an investigation. The Prosecutor was informed that numerous victim applications had been submitted to VPRS, and that the Prosecution should request these applications in order to review them as information that was clearly relevant to initiating an investigation.

[15] Referral on behalf of the Union of the Comoros, 14 May 2013.
[16] The evidence filed with the Prosecutor was voluminous. It has not been annexed to this Application but is available to be provided to the Chamber for review as may be required.

35. On 19 May 2014, the legal team of the Government of the Comoros provided the OTP with Supplemental Submissions[17] to the Referral that sought to address each of the concerns raised by the Prosecution at the meeting on 9 May 2014. The Supplemental Submissions addressed the OTP's concerns about the existence of 'contradictory' reports and accounts, about whether the attack was part of an international or internal armed conflict, the lawfulness of the naval blockade, and the gravity threshold having regard to the interests of victims and the interests of justice. Also annexed to the Supplemental Submissions were:

- a summary of the core evidence which shows that there is a reasonable basis to believe that crimes were committed against the persons on the Flotilla;[18]
- a table of further evidence - including new witness statements, video and photographs of the attack, translated forensic scientific and medical reports, autopsy reports, an expert report of damages to the vessels, a crime scene investigation report on the Mavi Marmara, a full list of passengers, and passenger pledges for non-violence;[19]
- copies of autopsy and forensic scientific reports which included statements and information about the attack and the shootings on board the Flotilla as well as a medical analysis relevant to investigating the alleged crimes;[20] and
- an in-depth expert report which set out in detail the pattern of the attack with accompanying photographs, references to video materials and autopsy reports.[21]

36. In respect of the required gravity threshold, the Applicant stressed that:

[17] Supplemental Submissions. See, note 12 above.
[18] Supplemental Submissions to the Prosecution on the Referral from the Union of the Comoros, 19 May 2014, Annex 1 (hereinafter "Supplemental Submissions, Annex 1").
[19] Supplemental Submissions to the Prosecution on the Referral from the Union of the Comoros, 19 May 2014, Attachment A (hereinafter "Supplemental Submissions, Attachment A").
[20] Supplemental Submissions to the Prosecution on the Referral from the Union of the Comoros, 19 May 2014, Attachment B (hereinafter "Supplemental Submissions, Attachment B").
[21] Supplemental Submissions to the Prosecution on the Referral from the Union of the Comoros, 19 May 2014, Attachment C (hereinafter "Supplemental Submissions, Attachment C").

- The events on the Flotilla "*are sufficiently grave in themselves to warrant an investigation", and they "are certainly grave when examined as part of the wider, protracted conflict between Israel and Palestine of which they undoubtedly formed a part*."[22]

- The OTP is "*not restricted in [its] investigation to only what occurred on the flotilla*" and the OTP is entitled to "*consider surrounding events to assist in your understanding of the events on the flotilla, particularly in order to gather both direct and circumstantial evidence to seek to determine the intention and actions of the IDF who were involved in the alleged acts aboard the flotilla, and the plans and policy which led to these events.*"[23]

- The "*blockade was only a part of the overall strategy in the armed hostilities, and the related surrounding operations would have to be investigated to the extent that they assisted in scrutinising the conduct of the IDF in the operation directed at the flotilla*."[24]

- The OTP "*policy also recognises that your office should not apply an overly restrictive approach to 'gravity' especially at this early stage of the proceedings*"[25].

37. The Applicant attaches hereto as Annex 2, the Supplement Submissions in order that the Chamber can review the arguments on behalf of the Comoros that were before the Prosecutor.[26]

38. The Applicant submits that it is significant that the Prosecutor neither referred to any of these submissions and materials in the Decision, nor sought to explain on what basis they should all be disregarded. Of course, the Prosecutor is not required to address each and every argument made, but it cannot be right to address none of the arguments put forward by a State Party in a Referral, especially when they concern the key issue of gravity which the Prosecutor relied on to refuse to take the matter any further.

39. On 21 August 2014, the legal team for the Government of the Comoros wrote to the OTP inquiring about a date when a decision on whether to initiate an investigation might be made. The legal team expressed concern about the

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[22] Supplemental Submissions, para. 31.
[23] Supplemental Submissions, para. 32.
[24] Supplemental Submissions, para. 33.
[25] Supplemental Submissions, para. 35.
[26] As with the materials submitted with the Referral, the supplemental materials can be provided to the Chamber for review as may be required.

delay in initiating an investigation, noting that "there is a simple and straightforward legal and factual basis on which to proceed to investigate the crimes alleged in the Referral given how the victims were persons caught up in hostilities which formed part of an armed conflict." In addition, the legal team emphasised that the OTP's analysis of the evidence would have to take into account "*not only the alleged events on the flotilla but the extent to which they formed part of a wider pattern of war crimes and crimes against humanity committed on the territories of the parties which were directly relevant to characterising the crimes committed on board the vessels.*"[27]

40. On 25 August 2014, the legal team received a letter from the OTP which stated that the OTP was continuing its review and analysis of the materials submitted by the legal team as well as of materials submitted by the Foundation for Human Rights and Freedoms and Humanitarian Relief ("IHH")[28] on 19 August 2014. The OTP stated that these "efforts are on-going and the Prosecutor will issue her decision once this review process is completed."[29]

41. The materials supplied by IHH on 19 August 2014 included the following:[30]

- a report of the Flotilla project, released by IHH shortly after the attack;
- a DVD containing video & photographs of the attack;
- a DVD documentary of the Flotilla and the attack;
- autopsy reports 9 deceased;
- translations of Forensic reports of severely injured passengers;
- a book containing interviews with a selection of passengers after the attack;
- a selection of more victim statements;
- a full passengers' list;
- an expert report describing the damages of the three vessels belonging to IHH;

[27] Letter from Elmadag Law Firm to the Office of the Prosecutor, 21 August 2014.
[28] See, Referral on behalf of the Union of the Comoros, 14 May 2013, para. 9, in which it is explained that IHH had submitted a prior Communication on 14 October 2010 pursuant to Article 15.
[29] Letter from the Office of the Prosecutor to Elmadag Law Firm, OTP/COM/Elmadag/250814/PM-erak, 25 August 2014.
[30] See, Supplemental Submissions, Attachment A. Above is a list of some of the main documents included in Attachment A, which was provided to the OTP with the Supplemental Submissions of 19 May 2014 in order to advise the OTP of the evidence already submitted to VPRS by IHH which the OTP could obtain. Attachment A made clear that it listed all categories of documents submitted by IHH to VPRS on 5 March 2014.

- a crime scene investigation report, conducted upon arrival of the Mavi Marmara in Turkey;
- letters sent before the departure of the Flotilla to the Israeli Embassy, the UN and affiliated organizations, OIC, heads of States (including Israel), religious leaders such as the Pope and other NGOs like Amnesty International;
- information bulletins distributed to the passengers who were accepted on the Flotilla describing the program and what to bring with them etc; and,
- the contract to be signed by the passengers agreeing not to take part in violence, and to obey instructions of the organisers.

42. In light of the length of time taken just to decide whether to investigate this case, on 4 September 2014, the legal team sent a letter to the OTP to express further concerns that the OTP did not indicate in their letter of 25 August 2014 "when a decision about opening an investigation will be made". The legal team clarified that materials submitted by IHH on 19 August 2014 were not new and need not delay matters any further. They had previously been submitted to the VPRS and the Prosecutor had been advised to request and review them by Counsel for the Applicant at the meeting in May with the Prosecutor. In respect of the seriousness of the alleged crimes and potential deterrent effect of opening an investigation without any more unnecessary delays, it was stressed that:[31]

    - "[T]hese same hostilities have continued with massive civilian causalities over the past weeks" and "your Office *does* have a firm jurisdictional basis under the Statute in respect of the State Referral from the Government of the Comoros to investigate crimes allegedly committed in the midst of the on-going conflict between Israel and Palestine."

    - "The delay in opening an investigation continues to negate the potential deterrent effect on the commission of further crimes. It could be said that alleged perpetrators may take some reassurance from the delay in opening an investigation that their actions will not be subjected to the ICC's jurisdiction."

43. On 8 October 2014, the legal team sent another letter to the OTP to inquire about the delay in making a decision to open an investigation. The legal team also highlighted that: "*The Government of the Comoros is most anxious that*

[31] Letter from Elmadag Law Firm to the Office of the Prosecutor, 4 September 2014.

*the preliminary proceedings should not drag on with no end in sight, and without, as a minimum justification for delay, an indication from your Office of what may be the perceived difficulties in opening an investigation right away."*[32]

44. The legal team encouraged the OTP to liaise with the legal team if there were any particular matters that were still delaying a decision to open an investigation. The legal team requested that the OTP "advise if there are any particular matters that are delaying you in opening an investigation" and made clear that it was "available to assist with providing all necessary information on facts and representations on law to ensure that your Office moves forward with investigating the alleged crimes without further delay."[33] The legal team further emphasised that:

> *"if there are particular issues about which you remain concerned, or about which you may need more information or submissions, please tell us as soon as possible and before any decision adverse to the interests of the Government of the Comoros, and to the victims on Board the Mavi Marmara and other vessels seeking to bring aid to Gaza, is made*."[34]

45. In addition, the legal team suggested that it could facilitate a visit to the Mavi Marmara in order to assist with any concerns the OTP might still have concerning the seriousness of the alleged crimes. The legal team informed the OTP that they could inspect the ship and conduct a first-hand examination of the crime scene where passengers were killed, shot, injured and abused. The legal team also offered again to facilitate interviews with passengers of the ship, and noted that this could be organised immediately in order not to delay the OTP's decision any further.[35]

46. The Applicant has attached hereto as Annex 3 the correspondence between the parties in order that the Chamber can review all of the arguments and submissions that the Prosecutor had available to her before she made her

[32] Letter from KC Law Solicitors and Advocates to the Office of the Prosecutor, 8 October 2014.
[33] Letter from KC Law Solicitors and Advocates to the Office of the Prosecutor, 8 October 2014.
[34] Letter from KC Law Solicitors and Advocates to the Office of the Prosecutor, 8 October 2014.
[35] Letter from KC Law Solicitors and Advocates to the Office of the Prosecutor, 8 October 2014.

decision, including those pertaining to the gravity of the situation and the deterrent consequences of an investigation.

47. On 6 November 2014 the Prosecutor made public her decision not to commence an investigation, a year and a half after the Referral had been submitted.

**STANDARD OF REVIEW**

48. The provisions of Article 53(3)(a) are as follows:

> *"3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision."*

49. The standard of review under this provision is not defined in any other provision of the Statute, Rules or Regulations. There has been no previous application made under this Article. The Pre-Trial Chamber in the present case will therefore have to elaborate the applicable standard of review.

50. In order to assist the Chamber, the Applicant has set out hereunder its submissions on what is the appropriate standard to adopt, taking into account that Article 53(3)(a) permits the Pre-Trial Chamber to request the Prosecutor to reconsider her decision not to open an investigation.

51. In the Applicant's submission, the Chamber should apply a similar standard in respect of Article 53(3)(a) to that applied by the Appeals Chamber reviewing the exercise of discretion of a Trial Chamber or Pre-Trial Chamber.[36] The Prosecutor's determination about whether to open an

[36] *Prosecutor v. Kony, et al.*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05-408, 16 September 2009 citing *Prosecutor v. Milosevic*, Decision on Interlocutory Appeal of Trial Chamber's Decision on the Assignment of Counsel, Case No. IT-02-54-AR 73.3, 1 November 2004.

investigation lies within her discretion subject to the review of the Pre-Trial Chamber as provided for in Article 53(3)(a).

52. The Appeals Chamber in *Kony et al.*, set out the standard for reviewing discretionary decisions in the following terms:

> "*In reviewing this exercise of discretion, the question is not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but rather 'whether the Trial Chamber has correctly exercised its discretion in reaching that decision.' In order to challenge a discretionary decision, appellants must demonstrate that 'the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion,' or that the Trial Chamber '[gave] weight to extraneous or irrelevant considerations, ... failed to give weight or sufficient weight to relevant considerations, or ... made an error as to the facts upon which it has exercised its discretion,' or that the Trial Chamber's decision was 'so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion.*'"[37]

53. In addition, the Appeals Chamber in *Bemba* stated that:

> *"The Appeals Chamber has previously held that it may justifiably interfere with a sub judice decision 'if the findings of the [Chamber] are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues.'"*[38]

54. The Applicant submits that the Chamber is duty bound to intervene in reviewing the Prosecutor's decision in the present Situation when any of these grounds and circumstances are made out.

55. The Prosecutor is required by the provisions of the Statute to apply the 'reasonable basis to believe' standard in a rational, fair and consistent manner, including in assessing whether different cases are sufficiently grave

[37] *Prosecutor v. Kony, et al.*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05-408, 16 September 2009 citing *Prosecutor v. Milosevic*, Decision on Interlocutory Appeal of Trial Chamber's Decision on the Assignment of Counsel, Case No. IT-02-54-AR 73.3, 1 November 2004.
[38] Prosecutor v. Bemba, Judgement on the Appeal of Bemba against Trial Chamber Decision on Admissibility and Abuse of Process, ICC-01/05-01/08-962, 19 October 2010 , para. 63.

to believe that there is a reasonable basis to proceed with an investigation. Her discretion must be exercised reasonably, within the confines of the law, and by taking all relevant factors into account, with reasons to be given for her conclusions. These reasons, and the Prosecutor's approach and conduct as a whole, can be reviewed by the Chamber in accordance with the provisions of Article 53(3)(a).

56. As with any appeal or review, the grounds that are relied upon must be material to the outcome of the impugned decision. In other words, it must be established that the decision might have been substantially different but for the errors committed.[39]

57. The Applicant highlights that in reviewing the actions of the Prosecutor, the Judges should be guided by their overall responsibility for upholding the underlying core values and principles of the ICC as set out in the Preamble of the Rome Statute. In particular, the Preamble emphasises that "*the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation*", and that the overriding purpose of the ICC's establishment is to "*put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.*"[40]

58. It is a significant feature of the present Situation that no alleged perpetrators are being prosecuted in Israel or any other jurisdiction for the crimes that were committed. In the absence of the ICC launching an investigation, the prospects of holding those responsible to account in any court of law is essentially nil. Should there be any ambiguity over whether the Pre-Trial Chamber should intervene to request the Prosecutor to reconsider her decision, then the guiding consideration of putting an end to impunity should

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[39] *Prosecutor v. Katanga,* Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 37; *Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", ICC-02/04-01/05-408, 16 September 2009, para. 48.
[40] Rome Statute, Preamble.

weigh in favour of the Chamber requiring the Prosecutor to re-examine her determination before dismissing the Situation altogether of being unworthy of investigation, particularly where it is already established that a reasonable basis exists for finding that crimes within the Court's jurisdiction were committed.

59. Moreover, as the Applicant has stressed in all of its submissions to the Prosecutor, the opening of an investigation could have a telling deterrent effect on those continuing to perpetrate alleged crimes in the on-going conflict between Palestine and Israel. The Prosecutor has repeatedly recognised her vital role in deterring international crimes. This is reflected in her policy on Preliminary Examinations[41] and she has made many public statements following reports of crimes to seek to deter the perpetrators (most recently in respect of violence in Nigeria[42]). The situation in Gaza should be treated no differently. In applying the standard of review the Chamber should assess the actions of the Prosecutor in respect of the Flotilla and Gaza in light of her stated deterrent function and whether she has acted consistently in respect of the violence in this situation.

**GROUNDS OF REVIEW**

60. The Applicant relies on various grounds and reasons in requesting the Chamber to direct the Prosecutor to reconsider the Decision. These are set out below. The Applicant submits that these reasons on their own and / or cumulatively provide cogent grounds for the Chamber to require the Prosecutor to reconsider her decision not to take the Situation any further.

[41] OTP Policy Paper on Preliminary Examinations, November 2013, paras. 104-106.

[42] Press Release: Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following reports of escalating violence in Nigeria, 20 January 2015 (http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-20-01-2015.aspx). See also, 14.11.12 - ICC/ASP - ASSEMBLY OF STATES PARTIES TO FOCUS ON COOPERATION, BUDGET AND ELECTIONS, Hirondelle News Agency, 14 November 2012 (http://www.hirondellenews.com/icc/319-icc-institutional-news/33887-141112-iccasp-assembly-of-states-parties-to-focus-on-cooperation-budget-and-elections).

61. The Prosecutor has failed to take into account highly relevant legal and factual considerations, in particular aggravating factors that reveal the gravity of the Situation, and she has misapplied the applicable law and the legal standard of proof for initiating an investigation, all of which would have materially affected the outcome of her determination. But for these errors, the Prosecutor's decision could have been substantially different and she could, and the Applicant submits inevitably would have, determined that an investigation should be opened.

**Disregard of the relevant contextual elements of the alleged crimes and potential cases**

62. The Prosecutor should be requested to reconsider her central findings that (i) the criteria of Article 8(1) (committed "as part of a plan or policy or as part of a large-scale commission of such crimes") are not satisfied as the Court's jurisdiction does not extend to "crimes" which did not take place on the Mavi Marmara (and the other 2 vessels registered to ICC States Parties) and which occurred in the context of the conflict between the IDF and Hamas / Palestine, and (ii) the Prosecution is not entitled to assess the gravity of the alleged crimes committed on board the Mavi Marmara "in reference to other alleged crimes falling outside the scope of the referral and the jurisdiction of the ICC".

***Classifying and characterising the crimes on board the vessels***

63. It is correct that the Prosecutor has no jurisdiction to *charge* persons with any crimes that have occurred in the wider context of the conflict (subject of course to the new Situation on Palestine that has just been opened), but that does not prevent the Prosecutor from taking into account the wider context in order to determine whether the conduct on the three vessels constitute crimes within the ICC's jurisdiction.

64. Indeed, this is precisely what the Prosecutor has done in considering the wider context of the conflict / occupation and the blockade. She has no

jurisdiction to charge anyone in respect of the blockade, even if it is unlawful, but the Prosecutor has rightly taken into account that the lawfulness of the blockade is essential for determining whether there is a reasonable basis to believe that a crime over which she does have jurisdiction to charge persons - the unlawful attack on civilian objects - did occur and could be investigated by her office. The Prosecutor did not find it necessary to reach any conclusion on the blockade at this stage. In exactly the same way, the Prosecutor is perfectly entitled to take into account the wider context of the blockade and the occupation and all the allegations of unlawful acts that have occurred in this context to determine whether the elements of Article 8(1) have been satisfied to the "reasonable belief" standard only for the purpose of characterising the crimes over which she does have jurisdiction.

65. In other words, the Prosecutor cannot charge members of the IDF with any of the offences that have occurred during the blockade and the occupation, but she is properly entitled to consider these acts as setting the context in which the conduct on the Mavi Marmara occurred (as she accepts) to determine whether that conduct, which she can charge, was committed as part of a plan or policy or a large-scale commission of such crimes.

***The gravity requirement and the guideline provisions of Article 8(1)***

66. The gravity requirement (as expressed in Article 8(1) as a guideline) is a pre-condition to the exercise of jurisdiction; it a contextual requirement for war crimes. There is no restriction placed on the Prosecutor in relying on all available information to satisfy this requirement.

67. The Prosecutor has cited to no authority in support of her refusal to consider the context of the criminal conduct. There is no rule which says that the Prosecutor can only rely on evidence of what happened on the vessels - and nothing else - to establish jurisdiction. If that were the case, the Prosecutor would be precluded from considering the wider occupation in which the events on the vessels took place in order to characterise the conduct on the vessels as being capable of being charged as war crimes. Indeed, the

Prosecutor is required to take into account all relevant facts to characterise the criminal conduct that is disclosed in the information provided to her.

68. The language of Article 8(1) only requires the crimes to be committed as "*part of*" a policy or plan or large-scale pattern. There is no express provision that each and every one of the acts or crimes that constitute the plan, policy, or large-scale pattern must come within the jurisdiction of the Court.

69. As the Prosecutor has done with the issue of the blockade, there is no need for her to decide conclusively at this stage that the crimes on the Mavi Marmara were committed as part of a plan or policy or were widespread; only that there is a reasonable basis to believe that they could be so characterised and that this requires investigation. As the Prosecutor has noted, the findings at the present stage before any investigation are "preliminary" and non-binding and will be reconsidered in light of all new facts or evidence. The purpose of the investigation is to examine all of the facts and evidence in detail. The Prosecutor gave the same indication in relation to the potential defence of self-defence - it is a matter to be considered during the investigation and not at the stage of the preliminary examination.[43] (And as noted above, this is what the Prosecutor did in relation to the wider context of peacekeeping in Darfur in order to investigate the single attack on the peacekeepers.)

70. Taking this approach to the jurisdictional requirement of gravity in the present Situation would have changed the exercise the Prosecutor performed and its outcome. She chose, without any authority in support of her approach, to restrict her assessment of the character and seriousness of the crimes over which she has jurisdiction and of whether they formed part of a plan, policy or wider pattern by actively excluding consideration of the evidence of that plan, policy and wider pattern.

[43] The Decision, para. 57.

***Applicable case law***

71. National and international courts consistently consider evidence beyond the jurisdiction of the crimes that have been charged in order to adjudicate on the crimes that do come within their jurisdiction. For example, a plan to commit crimes in one country may have been hatched in a country over which the national court of the country where the crimes are committed has no jurisdiction. Evidence of the hatching of the plan that happened in the other country will always be admissible. Or, an even simpler example, evidence that a defendant said in country X that he intended to kill someone in country Y would always be admissible at a trial of the man in country Y for murder whatever the jurisdiction of that country for crimes committed in country X.

72. Chambers of the ICC and other international courts including the ICTY, ICTR and the SCSL have admitted and relied on evidence about events that occurred beyond the jurisdictional remit of the courts concerned in order to prove the elements of offences which occurred within the jurisdiction of these courts. Such 'extra-jurisdictional' evidence was relevant to establishing the plan, policy, pattern, state of mind of the accused, and wider context of the particular crimes with which the accused were charged that fell within the jurisdiction of the court.[44] The Prosecutor referred to none of this case law in her decision. For example:

- In *Nahimana* at the ICTR, the Trial Chamber found that it could rely on evidence which falls outside the temporal scope of an indictment and/or the jurisdiction of the Court. The Appeals Chamber confirmed this position holding that:

> *"It is well established that the provisions of the Statute on the temporal jurisdiction of the Tribunal do not preclude the admission of evidence on events prior to 1994, if the Chamber deems such evidence relevant and of probative value?56 and there is no compelling reason to exclude it. For example, a*

[44] See, *Prosecutor v. Nahimana et al.*, Judgement, ICTR-99-52-A, 28 November 2007, para. 315; *Prosecutor v. Taylor*, SCSL-03-01-T, Judgement, 18 May 2012, paras. 98, 102; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, paras. 78-129.

*Trial Chamber may validly admit evidence relating to pre-1994 acts and rely on it where such evidence is aimed at:*
*- Clarifying a given contexts?*
*- Establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in 1994;*
*- Demonstrating a deliberate pattern of conduct."*[45]

- The same view was taken by the Special Court for Sierra Leone in its Judgment in *Taylor*, in finding that *"[i]n many instances during the trial proceedings, the Trial Chamber held that evidence falling outside of the temporal and/or geographical scope of the Indictment and/or the jurisdiction of the court, was admissible pursuant to Rule 89(C), as it was relevant to the context and/or chapeau requirements of the alleged crimes, or as evidence of a consistent pattern of conduct under Rule 93. The Trial Chamber reiterates its previous decisions concerning the admissibility of this evidence*"[46].

- In *Akayesu* at the ICTR, historical facts and alleged crimes which were beyond the Tribunal's temporal jurisdiction from 1 January 1994 until 31 December 1994, were taken into account in order to explain the context of the Rwandan conflict and demonstrate the existence of a genocidal policy.[47] The Trial Chamber considered the historical background of the conflict in order to determine whether crimes constituted genocide, or "were only part of the war between the Rwandan Armed Forces (the RAF) and the Rwandan Patriotic Front (RPF)."[48]

- In a case before the ICTY, the Appeals Chamber permitted the Prosecutor to lead evidence about crimes of which the accused had been acquitted in an earlier trial, in a retrial for different crimes. The

[45] *Prosecutor v. Nahimana et al*., Judgement, ICTR-99-52-A, 28 November 2007, para. 315.
[46] *Prosecutor v. Taylor*, SCSL-03-01-T, Judgement, 18 May 2012, para. 98.
[47] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, paras. 78-129.
[48] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 112. See also, Ass. Prof. Dr. iur. Ali Emrah Bozbayindir, A brief Analysis of Gravity Assessment of the Office of the Prosecutor in the Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53 (1) Report.

Court found that admitting evidence of crimes of which the accused had been acquitted did not violate the rule against double jeopardy or any other rules on the basis that the accused were not charged with these same crimes in the retrial. The Court reasoned that the evidence about the actions of the accused in respect of these incidents (which were outside of the jurisdiction of the court for the purpose of charging the accused in the retrial) could nevertheless be relevant to proving the allegations that the accused were involved in a plan or policy to commit the specific crimes with which they were charged in the retrial.[49]

73. Before the ICC, evidence has been considered and relied on which is outside the scope of the jurisdiction of the particular Situation, for example:

- In the Libya Situation, the Pre-Trial Chamber relied on contextual evidence which pre-dated the temporal jurisdiction of the Court that commenced on 15 February 2011 in order to demonstrate that the crimes were carried out through the Libyan State apparatus - including by the alleged perpetrators - against the civilian population as part of a widespread and systematic attack.[50]

- In the Sudan Situation, the Pre-Trial Chamber took into account evidence submitted by the Prosecution which preceded the Court's temporal jurisdiction that commenced on 1 July 2002.[51] The Pre-Trial Chamber considered documents which provide a historical context to

[49] *Prosecutor v. Haradinaj et al.*, Decision on Haradinaj's appeal on scope of partial retrial, IT-04-84bis-AR73.1, 31 May 2011, paras. 39-40.
[50] See for example, Situation in the Libyan Arab Jamahiriya, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", ICC-01/11-01/11-1, 27 June 2011, para. 26. See also, Situation in the Libyan Arab Jamahiriya, Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI, ICC-01/11-4-Red, para. 8.
[51] Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting, S/RES/1593, 31 March 2005, para. 1.

the alleged crimes and allegedly demonstrated genocidal intent on the part of the accused.[52]

74. If the killings on the Mavi Marmara come to be tried before the ICC, evidence of who in Israel had ordered these offences and of preparations by the IDF before ships of the Flotilla were boarded, would be admissible. If Israeli Government and / or IDF planning involved other operations on land or at sea to suppress all opposition to the blockade by violent means, such evidence would be admissible to prove that the crimes on the vessels were committed as part of a widespread plan or policy, even if the court had no jurisdiction to try crimes that might have been committed in those other operations.

75. In short, a reasonable prosecutor would seek to rely on *all* available evidence of the planning and implementation of the crimes on board the vessels in order to prove the crimes and their gravity.

***The relevant contextual evidence***

76. The Prosecutor's conclusion is based on a demonstrably erroneous interpretation and application of the law. As a result, the Prosecutor did not consider whether evidence of the unlawfulness of the blockade and the occupation of Gaza could have a bearing on the gravity of crimes allegedly committed on board of the vessels and on whether there was a reasonable basis to believe that they could form part of a wider plan or policy to commit similar crimes.

77. At **no** point in the Decision is any consideration given to the breadth of information that was before the Prosecutor about the blockade being a disproportionate and collective punishment of the civilians of Gaza. The Decision notes the reasons why the blockade could be regarded as lawful (the

[52] See for example, Situation in Darfur, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, paras. 166-169. See also, Situation in Darfur, Public Redacted Version of the Prosecutor's Application under Article 58, ICC-02/05-157-AnxA, 14 July 2008, paras. 86-87, 349-354, 356.

IDF viewpoint[53]) subject to standard issues of proportionality etc but never the other argument as to why the blockade could itself be regarded as a crime from its inception within which the attack on the Flotilla would inevitably be unlawful. This is a very significant asymmetry in approach. The Prosecutor has taken into account the reasons why the blockade could diminish the seriousness of the crimes, but has ignored the reasons why it could show the crimes to be aggravated and demanding of investigation by the ICC.

78. The error is compounded by conclusions that the Prosecutor has drawn about the attack itself. She has concluded that it was an attack on the "vessels" and not the "civilians"[54], and that in any event it was not a disproportionate attack.[55] These must surely be matters for further investigation in light of the evidence, *inter alia*, of the firing of live ammunition from the helicopters before the vessels were boarded and manner in which the civilians were captured and treated. The UN inquiries both found the attack to be excessive and disproportionate with no reasons ever given by the IDF as to why the deaths occurred.[56]

79. These errors by the Prosecutor made it impossible for her even to consider whether the attack in its nature and characteristics formed part of a plan or policy to target civilians and in particular to enforce the blockade. The ICRC's and UN's position that the blockade constituted a collective punishment of civilians must demand of a reasonable prosecutor a finding of an arguable case that a reasonable basis exists to believe that the attack on the Flotilla could form part of a wider plan or policy to pursue a disproportionate blockade of the civilians of Gaza. The evidence of crimes committed in other IDF operations to maintain the blockade and the occupation by Israel, which has itself been characterised as a serious violation of international law, has also been disregarded. In sum, a very substantial body of highly relevant evidence has been excluded - and it must have been a conscious decision of

[53] The Decision, para. 11.
[54] The Decision, para. 99.
[55] The Decision, paras. 107-110.
[56] UNHRC Report, paras. 172, 264; Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011, paras. 116-117, 126-127 (hereinafter "Palmer Report").

the Prosecutor or her team to exclude - in favour of her considering the limited material she in fact relied on.

80. When considering whether there is any evidence of crimes against humanity, the Prosecutor in two short paragraphs simply concluded that the information does not show that crimes were committed as part of a widespread or systematic attack.[57] The Prosecutor provides no indication of what evidence she assessed to reach this conclusion. Whether the attack was one operation that formed part of various IDF operations in the same conflict is plainly a question to which any reasonable prosecutor would have had to apply his or her mind. The Prosecutor did not do so in the Decision.

81. The Chamber should therefore direct the Prosecutor to consider all of these vital issues and to render a new decision in light of a proper assessment of all the relevant factors.

**Failure to take account of highly relevant factors in assessing the scale, nature, manner of commission and impact of the crimes and the potential perpetrators**

82. The Prosecutor stated that an evaluation of whether the gravity threshold has been met for the purpose of opening an investigation must focus on "(i) whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes committed within the incidents which are likely to be the focus of an investigation."[58] In considering the latter requirement, the scale, nature, manner of commission and impact of the alleged crimes must be considered. The Prosecutor emphasised that the threshold set out in Article 8(1) of the Statute "provide[s] statutory guidance indicating that the Court should focus on war crimes cases meeting these requirements."[59]

[57] The Decision, paras. 130-131.
[58] The Decision, paras. 135-136.
[59] The Decision, para. 137.

83. However, the Prosecutor has completely failed to address and apply these considerations and has given no weight to the most relevant aggravating factors which show that there is a reasonable basis to initiate an investigate. The Applicant has set out below the discernable errors committed by the Prosecutor in respect of each of these matters.

84. The Applicant underlines that, as submitted above, the Prosecutor has failed to take into account the wider context of the alleged crimes committed on the Flotilla. Each of the submissions below on the characteristics of the particular crimes must be read in conjunction with the Prosecutor's overall failure to give any weight to the aggravating context of which they form a part. Indeed, an assessment of the scale, nature, manner of commission, and impact of the crimes; the alleged perpetrators; and whether they form part of a plan or policy or large-scale pattern must logically encompass all aspects of the alleged criminal conduct in its proper context. The Prosecutor should have considered the factors of scale, nature, manner of commission and impact in light of all of the circumstances, but failed to do so choosing instead artificially to focus only on certain specific details of the allegedly unlawful acts that occurred on the vessels.

***Individuals or groups of persons who are likely to be the object of an investigation***

85. The Prosecutor has not at any stage in the Decision considered and referred to any potential perpetrators at any level of command, let alone to those who could be held to bear the greatest responsibility. This is a glaring omission that demonstrates that the Prosecutor has not applied the very criteria for assessing gravity which she herself has identified. On this basis alone, the Prosecutor should be required to reconsider her decision in order specifically to consider the potential perpetrators of the alleged crimes, and whether, given their level of command in the political and military hierarchy, this factor could render the situation sufficiently serious for investigation.

86. The Applicant had highlighted in its submissions to the Prosecutor that senior IDF commanders and Israeli leaders could be investigated for planning, directing and overseeing the attack on the Flotilla.[60] The Prosecutor has failed to mention any of these submissions. These are superiors who failed to prevent or punish the alleged crimes of their subordinates, and who had been involved in other and related operations to enforce the blockade. The names of high-ranking potential perpetrators were also provided in victim applications submitted to the ICC that were available to the Prosecutor.[61] Furthermore, issues central to liability at the highest level of command were addressed in the public testimony before the Turkel Commission; for example:

- The Former Minister of Defence, Ehud Barak, who directly participated in the planning of the IDF operation and was responsible for ordering it, admitted during his testimony before the Turkel Commission that "mistakes" had been made in the planning and implementation of the operation.[62] He had stated at a press conference at the time that "[t]onight the IDF gained control over the flotilla which tried to enter the Gaza beaches and break the blockade. The cabinet, the Prime Minister and I instructed the IDF to take action."[63] During his testimony before the Turkel Commission he stated that "*I guided the IDF to make a status evaluation with regards to examining the option of interdicting the departure of the flotilla or reducing it in terms of the means, the regions, the timing and the methods which I cannot go into detail here. In this discussion comments were made both by me and by others, with regards to examining extreme situations and extreme scenarios, and the parties responsible for the action were requested to pay attention to such situations.*"[64]

- Former IDF Chief of Defence Intelligence, Amos Yadlin also acknowledged that "mistakes" were made at the highest level. During

[60] See for example, Referral on behalf of the Union of the Comoros, 14 May 2013, para. 22.
[61] See for example, the victim application of [redacted] (19 June 2010) (a UK national, who was shot in the head) that lists the following individuals as potential perpetrators to be investigated: Shimon Peres, Benjamin Netenyahu, Ehud Barak, Avigdor Lieberman, Gabi Ashkenazi, Eliezer Merom, Amos Yadlin, and Tal Russo.
[62] The Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission) Session Number Three, On 10.08.2010.
[63] Gaza flotilla: Excerpts from press conference with DM Barak, CoS Ashkenazi and Naval Commander Marom, Israel Ministry of Foreign Affairs, 31 May 2010 (http://www.mfa.gov.il/MFA/PressRoom/2010/Pages/Gaza_flotilla_press_conference_DM_Barak_CoS_Ashkenazi_Naval_Commander_31-May-2010.aspx).
[64] The Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission) Session Number Three, On 10.08.2010.

an interview in October 2013 he was reported as stating that "what happened on the Marmara was a big mistake". It was reported that days later he retracted this statement and said that he meant to say that there were mistakes on both sides.[65] In his testimony Ehud Barak confirmed that Yalin attended planning meetings held by Barak, with the IDF Chief of General Staff, Gabi Ashkenasi, the Commander of the Navy, Eliezer Marom, the head of the operations branch, the representative of the Foreign Ministry and other officials.[66]

87. As the Prosecutor should be aware, the Turkish Courts have on the basis of the available evidence sought the arrest and extradition of certain of these commanders and others, including former Chief of Staff, Gabi Ashkenazi; former Navy Chief, Eliezer Marom; former Intelligence Chief, Amos Yadlin; and former Naval Intelligence Chief, Avishai Levy,[67] while also opening an investigation against IDF Chief of Operations, Tal Russo.[68]

88. All of this information, which was available to the Prosecutor, shows that there is at the very least a reasonable basis to proceed with an investigation in light of the seniority of the alleged perpetrators. The Prosecutor should have at least addressed this issue in her Decision in light of the available evidence as a factor that is plainly highly relevant to assessing the gravity of the Situation. Not only does evidence already available highlight that those bearing the greatest responsibility could be investigated but also that a plan or policy, devised or known about at the highest levels to commit crimes could be proved.

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[65] Former intelligence chief speaks of Mavi Marmara 'mistakes', The Times of Israel, 6 November 2013 (http://www.timesofisrael.com/former-intelligence-chief-speaks-of-mavi-marmara-mistakes/).

[66] The Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission) Session Number Three, On 10.08.2010, p. 35-36.

[67] Turkey court issues arrest warrants to Israeli ex-generals over Gaza flotilla raid, Haaretz, 26 May 2014 (http://www.haaretz.com/news/diplomacy-defense/1.592911); Turkish court issues "historic" arrest warrants for Israeli army commanders, EI, 2 June 2014 (http://electronicintifada.net/blogs/nora-barrows-friedman/turkish-court-issues-historic-arrest-warrants-israeli-army-commanders).

[68] Israeli Major General Tal Russo to be added on the trial of Nov.6, IHH – facebook, 4 October 2012 (https://www.facebook.com/ihh.ar/posts/286502858123023); The Meir Amit Intelligence and Terrorism Information Center at the Israeli Intelligence & Heritage Commemoration Center, 13 November 2012 (http://www.terrorism-info.org.il/en/articleprint.aspx?id=20422).

***The scale of the alleged crimes***

89. In relation to the scale of the alleged crimes, the Prosecutor relied on the fact that the total number of victims "reached relatively limited proportions as compared, generally, to other cases investigated by the office."[69] The Prosecutor regarded this as a reason not to open an investigation even though she concluded that "[b]ased on the available information, at this stage, the precise or even approximate number of passengers who were victims of outrages upon personal dignity is unclear."[70] It is difficult to see how the Prosecutor could conclude that the numbers were less than other cases when she claims that even the approximate number of victims on the Flotilla is unclear.

90. In fact, the numbers of victims abused and mistreated are not unknown. The Prosecutor herself noted that in addition to the 10 deaths "around 50-55 … passengers were injured, some seriously, during these events on the *Mavi Marmara."*[71] In addition, the UN Human Rights Council fact-finding mission reported that in respect of hand-cuffing alone: "A number of passengers are still experiencing medical problems related to the handcuffing three months later and forensic reports confirm that at least 54 passengers had received injuries, transversal abrasions and bruises, as a result of handcuffing on board the *Mavi Mamara,*"[72] This report then goes on to document hundreds of other injuries, abuses and outrages to personal dignity.[73] It is well-documented that over 700 persons were passengers on the Flotilla and the vast majority of them have complained about the treatment they received being caught up in the attack on the Flotilla, of being traumatised by their capture and detention, and of being mistreated and humiliated in different ways and witnessing others being shot, injured and abused.[74] For the

[69] The Decision, para. 138.
[70] The Decision, para. 138.
[71] The Decision, para. 138.
[72] UNHRC Report, para. 135.
[73] See for example, UNHRC Report, paras. 129-161.
[74] See for example, UNHRC Report, paras. 109, 119-120, 176; Palmer Report, paras. 33, 34, 40; Richard Lightbown, Commentary on the Available Primary Data on the Israeli Attack on the Gaza Freedom Flotilla 31 May 2010, 15 May 2014, p. 247 (hereinafter "Lightbown Report").

purposes of starting an investigation, at this stage, it is quite wrong for the Prosecutor to ignore this information, and instead to claim that she cannot even estimate the number of victims.

91. The Applicant State Party provided over 50 witness statements as a sample of these victim complaints to the Prosecutor with the Referral for the present Situation along with many more statements in subsequent representations.[75] The Prosecutor also has at her disposal over 230 victim applications that have been filed with VPRS. During the meeting with the Prosecutor on 9 May 2014, and in a letter submitted to the Prosecutor on 4 September 2014[76], Counsel for the Applicant emphasised that these victim applications had been submitted, and that the Prosecution should review the information in these applications in order to appreciate the true scale and nature of the crimes. Many of these applications were provided to the Prosecutor in August 2014.[77] The Prosecutor had access to ample information at least to approximate the numbers of victims, which on every account run into the hundreds.

92. These figures are readily comparable with other cases which the Prosecutor has investigated and prosecuted, for example:

- *Haskanita case*: The Prosecution has conducted investigations and prosecutions in two cases against Abu Garda and against Banda and Jerbo which each involved a single attack for a few hours on an AU base in one village in Darfur. The Prosecutor found that this incident in which 12 peacekeepers were killed and there was an attempt to kill 8 others met the gravity threshold. As for the scale of the offences, it cannot reasonably be argued that this incident is more serious than the attack on the Flotilla. (The other arguments advanced by the Prosecutor to try to justify the decision to investigate this case in Sudan but not the IDF attack - that of impact - is similarly flawed and provides no reasonable basis to investigate one case but not the other.)

[75] See, Annex 1 hereto which provides an index of statements submitted to the Prosecution on 14 May 2013. See also, Supplemental Submissions, Attachment A (Annex 2 hereto) which summarises evidence submitted to the Prosecution.
[76] Letter from Elmadag law firm to the Office of the Prosecutor, 4 September 2014.
[77] See, Supplemental Submissions, Attachment A. See also, Letter from Elmadag Law Firm to the Office of the Prosecutor, 4 September 2014 which explains that the materials and statements submitted by IHH "on 19 August were in fact not new, but were statements and documents that had been previously submitted to the VPRS by IHH" which the Applicant requested the Prosecution review.

- *Lubanga*: The Prosecution prosecuted Thomas Lubanga for enlisting and conscripting child soldiers under the age of 15 years between 1 September 2002 and 13 August 2003. There were no charges for any killings, injuries or mistreatment - the case focused only on the use of child soldiers for which the accused was convicted.[78] There is no reasonable basis for deciding that this case is inherently more serious than the crimes committed on the Flotilla.

93. When the figures of those harmed on the Flotilla are properly taken into account, particularly in the context of the wider context of which their suffering formed a part, the Applicant submits that it is irrational for the Prosecution to have determined that the Flotilla Situation is any less serious than other cases prosecuted at the ICC, or so much so that it does not even warrant further investigation.

***The nature of the alleged crimes***

94. In dismissing that the nature of the crimes shows that they were of a sufficient gravity to warrant investigation, the Prosecutor has taken the definitive position that the treatment inflicted on the passengers did not amount to torture or inhumane treatment, as it lacked severity.

95. This is a surprisingly premature judgment to make, especially when the Prosecutor has herself indicated that she need not draw any conclusions at the Preliminary Examination phase. More serious is that there certainly is credible evidence of torture, and cruel and inhumane treatment, which the Prosecutor has completely ignored. Moreover, her conclusions are contrary to both UN reports - the Palmer Report and the Report of the UN Human Rights Council fact-finding mission - which at a minimum would provide a reasonable basis for her to proceed to investigate the alleged acts. These UN bodies found, *inter alia*, that:

- "During the period of detention on board the *Mavi Marmara* the passengers were subjected to treatment that was cruel and inhuman in nature and which did not respect the inherent dignity of persons who

[78] *Prosecutor v. Lubanga*, Warrant of Arrest, ICC-01/04-01/06-37, 10 February 2006.

have been deprived of their liberty."[79] The Mission's report expressed particular concern about "the widespread use of tight handcuffing of passengers on board the *Mavi Marmara* in particular and to an extent of passengers on board the *Challenger 1, Sfendoni* and the *Eleftheri Mesogios*" and concluded "that the manner in which the handcuffs were used was clearly unnecessary and deliberately used to cause pain and suffering to passengers."[80]

- "There was significant mistreatment of those on board the vessels in the aftermath of the take-over. Passengers were detained on board the vessels and subjected to physical mistreatment and psychological abuse, including: Indiscriminate and overly-tight handcuffing of passengers, including the injured; Pushing, shoving, kicking and beating; Denial of bathroom access, including to sick and elderly; Verbal harassment and intimidation; Prolonged and unnecessary exposure to elements on deck of *Mavi Marmara.*"[81]

96. The availability and use of handcuffs on people known in advance to be unarmed is of particular potential forensic value in any case where individual or collective *mens rea* has to be considered as here (the *mens rea* of individual members of the IDF or of their commanders, or of their high command or the politicians who commissioned or approved the attack). The IDF went equipped with sufficient plastic handcuffs for the hundreds of people on board of the vessels. What does this show of individual or collective intent / *mens rea*? Not simply an intent to stop the vessel full of peaceful protesters and providers of food, toys and other goods to a beleaguered community. Rather it showed - at a minimum - the desire to imprison by humiliating means a very large body of people whose intellectual approach to the Gaza conflict differed from that of the Government of Israel and who needed to be dissuaded by force and humiliation from ever repeating what was done.

97. This is evidence in addition to the evidence of the perpetration of the killings and gunshot and other injuries which can be regarded as behaviour calculated to intimidate, punish or coerce the victims, as provided for in the elements of

[79] UNHRC Report, para. 176.
[80] UNHRC Report, para. 179.
[81] Palmer Report, para. 40.

the crime of torture.[82] Furthermore, there is evidence of perpetrators showing a discriminatory *animus* towards Palestinians and those from Turkey[83], which should all have been taken into account by the Prosecutor before summarily rejecting any allegations of torture and inhumane treatment. She refers to none of this evidence in the Decision.

98. Several witness statements were submitted to the Prosecutor which recount very serious and severe instances of mistreatment; for example:

- ███████, a British citizen, stated that before de-boarding the Mavi Marmara into Israel, "*I was snatched and dragged from the room out onto the back deck up onto the upstairs deck where I was beaten by several soldiers and my hands were tightened and I was dragged by my hands down the steps and I was forced on my knees over two metal bar on which they rolled my legs. Fifteen minutes later when I could not balance myself and I fell onto my side two soldiers sat on me using me as a sofa. One of the soldiers spat on my head as he was drinking water. After that they poured water on my head repeatedly. I was next to the stairs and each time a soldier went up or down the stairs they kicked or trod on me. Twice during this time the mother and child came outside in order to give the baby some fresh air and he was witness to this treatment of me. I had eye-to-eye contact with one of the soldiers who had a taser in his hand – he was the only soldier I was with white shoes. This soldier blindfolded me again, put a plastic bag and black jumper over my head. I could hear him talking to one of the other soldiers and said in Hebrew 'Honeg' which means 'make him suffocate'*".[84]

- ███████ who was on the Mavi Marmara, describes passengers being attacked and bitten by dogs.[85] He also explains how he was strangled with his camcorder bag by IDF soldiers.

- ███████ describes surrendering to the IDF forces but then still being severely beaten by a group of soldiers and "*then made to strip down to my underwear and was thoroughly searched.*"[86]

[82] See, ICC Elements of Crimes, Article 8 (2) (a) (ii)-1 War crime of torture, provides: "… (*2) The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.*"
[83] See, Statement of ███████ (30 August 2014); Statement of ███████ (18 September 2013); Statement of ███████ (6 November 2012); Statement of ███████ (4 December 2014) whose evidence is also referred to in the Lightbown Report.
[84] Statement of ███████ (10 June 2010).
[85] Statement of ███████ (10 October 2013).
[86] Statement of ███████ (20 November 2013).

- [redacted], a passenger on the Challenger I, stated that "*four soldiers jumped me, on top of me. The first one immediately tied my hand. And the others they put me on the floor. And on the floor, there was glass from the broken door. So my face was in the glass. My fellow passenger a woman as well ... was on the floor. And the soldier stepped with his foot on her face in the glass. So I shouted for the soldier to stop. And instead he did it to me with one foot on the head and one foot on the back. So he was not touching the boat just on me ... they took a black bag and put it over her head [the woman next to her] ... They put me next to her on my knees. I told the soldiers that I have asthma and they should not do that. But still they put the bag on my head too. After above five minutes I complained that I could not breathe. And nothing happened except they put the handcuffs more tight.*"[87]

99. There is also evidence of abuse having a sexual character; for example, a female witness stated that:

> "*I was surrounded by soldiers pointing machine guns at me and every other passenger in that vicinity. My passport and purse were taken off me and I was searched and cuffed. I saw soldiers who had taken their balaclavas down for a few moment to wipe their faces (it was very hot and they were sweating). They stared at me, winking, smiling, laughing and making kissing gestures with their mouths. It was humiliating and as the female soldier touched my body to search me they laughed and were making comments in Hebrew that I could not understand. I got the impression they were of a sexual nature.*"[88]

***The manner of the commission of the alleged crimes***

100. The Prosecutor concluded that "the information available does not suggest that the alleged crimes were systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians or with particular cruelty."[89] She also found that "the information available indicates that the commission of serious crimes was confined to one vessel, out of seven, of the flotilla."[90] She relied on these findings to diminish the seriousness of the crimes.

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[87] Statement of [redacted] cited to in the Supplemental Submissions, Annex 1, notes 1, 2, 4, 5, 6, 7, 8, 12, 13, 15, 17, 18, 20, 21.
[88] See, Statement of [redacted] (6 November 2012).
[89] The Decision, para. 140.
[90] The Decision, para. 140.

101. The Prosecutor is in error. There is information available to the Prosecutor that the IDF fired live ammunition from the boats and the helicopters *before* the IDF forces boarded the Mavi Marmara, which is plainly consistent with a deliberate intent and plan to attack and kill unarmed civilians; for example:

- [REDACTED] [REDACTED], an Irish citizen and passenger on the Mavi Marmara, stated that "*While they were attempting to get on from the side of the boat, they were firing percussion grenades, paintball rounds and live rounds from the helicopters ... Within the first five to ten minutes as I was moving about the ship I came across the body of Cevdet Kiliclar. I came across his body with a bullet wound to his head within the first five to ten minutes … Importantly I saw his body before to the best of my knowledge any of the Israeli commandos had boarded the ship. Yes no commandos were on the ship at the time his body was found so he must have been shot from a helicopter*."[91]

- [REDACTED], a passenger on the Mavi Marmara, stated that "*While waiting, all of a sudden a helicopter appeared above us. And it gave a strong wind below towards the ship. By force of the wind all of our belongings there flew to the sea. In fact, it was so effective that some of our friends lost their balance. Then, they dropped various bombs like tear gas, blast, smoke and gas bombs. The attack continued for a long time. Afterwards, without landing the ship they started to shoot with guns using real bullets. Several friends were shot and fell down wounded. While gunfire was continuing, they released ropes and began to land to the ship*."[92]

- [REDACTED], a passenger on the Mavi Marmara, stated that "*On the helicopter, which was 9-10 meters above us, there was no country flag, insignia or pennant. The helicopter hovered in the air for about a minute and then opened fire ... After the helicopter had opened fire on us, in order to prevent us escaping to the right or left, thick ropes were thrown out from each side of the helicopter; it was then that I understood that soldiers would repel down.*"[93]

- [REDACTED], a Dutch citizen, stated that she was on the Challenger I looking at the Mavi Marmara as it was being attacked, and that she witnessed "*shooting from the helicopter. People fell down on the top deck of the Mavi Marmara.*"[94]

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[91] Statement of [REDACTED] (10 October 2013).
[92] Statement of [REDACTED] (19 July 2010).
[93] Statement of [REDACTED] whose evidence is also referred to in the Lightbown Report. See also, Annex 1.
[94] Statement of [REDACTED] cited to in the Supplemental Submissions, Annex 1, notes 1, 2, 4, 5, 6, 7, 8, 12, 13, 15, 17, 18, 20, 21.

- ███ ███ a passenger on the Sofia, stated "*I could see the helicopters, two helicopters, above the Mavi Marmara. I could hear shots. And I would like to emphasize that I know the difference between live ammunition and other ammunition. I had been a soldier myself and it was live ammunition. And these shots were fired before any Israeli soldier was on the boat*".[95]

- ██████████, a passenger on the Gazze I, stated that "*Suddenly two helicopters, whose lights were off, started hovering above the Mavi Marmara. We heard weapons being fired followed by the sound of bombs. I was shocked by what I saw through my binoculars. They were firing at people*."[96]

102. The Lightbown Report,[97] which was provided to the Prosecution, gave further examples of witness testimony about the firing of live ammunition from the helicopters at unarmed civilians on board the Mavi Marmara:

- *"Jamal Elshayyal said in witness testimony [From the Bridge Deck] you could almost see the soldiers pointing their guns down through some sort of hole or compartment at the bottom side of the helicopter, firing almost indiscriminately without even looking where they were firing and those bullets were definitely live bullets."*[98]

- "*Erdinç Tekir also testified that soldiers shot at him from the helicopters, wounding him in the hip. Osman Kurç was also wounded on the Navigation Deck. He said that there was firing from the helicopters as the commandos descended, and that he was shot multiple times in his abdominal area by this fire*."[99]

103. In addition, the Prosecutor should have taken into consideration the conclusion of the UN Human Rights Council fact-finding mission concerning the shooting of passengers from the IDF helicopters. It found that:

> "*The Israeli forces used paintballs, plastic bullets and live ammunition, fired by soldiers from the helicopter above and soldiers who had landed on the top deck. The use of live ammunition during this period resulted in fatal injuries to four passengers, and injuries to*

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[95] Statement of █████ cited to in the Supplemental Submissions, Annex 1, notes 1, 2, 4, 12, 13, 16, 17, 19, 20.
[96] Statement of ████████ (5 July 2010).
[97] Richard Lightbown, Commentary on the Available Primary Data on the Israeli Attack on the Gaza Freedom Flotilla 31 May 2010, 15 May 2014 submitted to the Prosecution in the Supplemental Submissions of 19 May 2014.
[98] Lightbown Report, para. 112.
[99] Lightbown Report, para. 162.

> *at least 19 others, 14 with gunshot wounds*"[100] … "*The Mission is satisfied that much of the force used by the Israeli soldiers on board the Mavi Marmara and from the helicopters was unnecessary, disproportionate, excessive and inappropriate and resulted in the wholly avoidable killing and maiming of a large number of civilian passengers.*"[101]

104. The Prosecutor does refer to the firing from helicopters in her decision, but she places no weight at all on the information set out above, and ignores it, when considering whether there was a planned and deliberate attack on civilians.

105. The Prosecutor goes so far as to conclude that:

> *"[N]one of the information available suggests that the intended object of the attack was the civilian passengers on board these vessels. Rather, viewed in the context of the interception operation, such an attack (i.e., the forcible boarding) appears to have been solely directed at the vessels. Since the attack was directed at the vessels of the flotilla, as opposed to the civilian passengers, the Office does not consider relevant in this respect the war crime of intentionally directing an attack against civilians under article 8(2)(b)(i)."*[102]

106. This extraordinary and sadly incomprehensible passage fails to explain how weapons designed to kill humans could be used to attack a vessel (in the way that, perhaps, a torpedo might). Further, it discounts not only the evidence of the firing from the helicopters, but extensive other evidence consistent with the targeting of civilian passengers and singling them out for unnecessarily cruel treatment. If this operation had only been about taking control of the vessels, as the Prosecutor concludes, there would have been no evidence of the callous treatment and abuse of civilians and no evidence of the use of firearms as none could be justified on the evidence of what happened and in light of the pre-existing knowledge that the passengers were all unarmed. The Prosecutor's conclusion cannot be reconciled with the evidence, for

[100] UNHRC Report, para. 117.
[101] UNHRC Report, para. 172.
[102] The Decision, para. 99.

example, of persons being shot multiple times[103] and in the face while trying to cover their heads[104], and from behind[105], including the evidence of ████ ████ a British national who was shot in the back of the head, then kicked in the face, and left to die. He stated that:

> *"I was at first shot at in the abdomen area (I don't know what weapon was used for this) and the injury was a red mark in the centre and a burn mark circling around this. Next I was shot in the back of my head using live ammunition (I don't know what weapon or what distance I was shot from); after they shot me four or five soldiers jumped on me and held me down on the floor. My hands were bound behind my back with cable ties and they started to kick my face. I know the name of the person who was kicking me in the face because I understand Hebrew and one of his colleagues shouted 'Oded he is dying, and they left me bleeding on the floor in the middle of the roof between half an hour to one hour on the roof. Israeli soldiers were standing over me during this time ... A soldier come onto the roof and looked at me and said in Hebrew 'that son of a whore is still alive.'"*[106]

107. Although the Prosecutor noted that passengers who were filming and taking photographs were shot[107], she did not regard this as evidence showing that civilians were targeted.[108] There was further evidence available to the Prosecutor of the IDF specifically pursuing passengers who were taking photographs and trying to record the excesses of the soldiers.[109] She fails to deal with the very obvious point that soldiers acting reasonably and following lawful instructions to detain a vessel (if that is what the Prosecutor finds as a possible inference to draw from all material available to her) would have no reason to resist a record being made of what happened - after all in modern military and policing methods helmet cameras are increasingly a norm of practice designed to record the *lawful* exercise of force. Killing those recording events is impossible to reconcile with any of the defence positions

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[103] See for example, Palmer Report, para. 34, 128, 134; Lightbown Report, p. 162; Witness statement of ████ ████ (19 July 2010); Statement of ████ (19 June 2010).
[104] See for example, Statement of ████ cited to in the Supplemental Submissions, Annex 1, notes 1, 2, 4, 5, 6, 7, 8, 12, 13, 15, 17, 18, 20, 21. See also, Palmer Report, para. 126; UNHRC Report, para. 123.
[105] See for example, Palmer Report, para. 34, 128, 134; Statement of ████ (19 June 2010).
[106] Statement of ████ (19 June 2010).
[107] The Decision, para. 59.
[108] The Decision, para. 99.
[109] For example see statement of ████ (19 September 2014).

of the IDF or, again to state the obvious, with maintenance of the right of freedom of speech or the right to demonstrate - that must exist on the high seas as on the better bits of dry land - or of the inalienable right of one peaceful human to bring succor to suffering fellow humans.

108. There is evidence that even when the passengers surrendered to the IDF and pleaded with them to stop firing at civilians, the gunfire did not cease.[110] The attack continued regardless. For example, one of victims, [redacted], stated that "*I kept saying 'This is a message to the Israeli army.' I said 'Please stop firing. Please do not attack us, we are civilians. We are not resisting. Innocent people are dead. People are dying. We need urgent medical care' ... Throughout these messages I could still hear the firing continuing ... I thought it was a machine gun.*"[111]

109. This evidence directly contradicts the Prosecutor's conclusion that the available information does not suggest that civilians were deliberately attacked pursuant to a plan or policy. The Prosecutor mentions that the IDF continued shooting even after attempts to surrender[112], but fails to consider this evidence when evaluating the manner of the commission of the crimes and in particular whether civilians were directly targeted.[113]

110. Not only has the Prosecutor found that there was no deliberate attack, she has even concluded that the attack was not disproportionate and thus unlawful. The Prosecutor has applied a flawed legal test and ignored critical evidence. As with many other issues, the Prosecutor must be directed to reconsider her conclusion on whether the attack was disproportionate.

111. The Chamber reasoned that "the available information suggests that during the planning and development of the operation, the Israeli authorities did not have information indicating that passengers intended to respond to any

[110] See, Statement of [redacted] (6 November 2012); Statement of [redacted] (30 August 2014); Statement of [redacted] (6 November 2012).
[111] Statement of [redacted] (6 November 2012).
[112] The Decision, para. 59.
[113] The Decision, para. 99

boarding attempt with organised, violent resistance." Yet, it is known that the commanders who planned the operation considered all possible responses.[114] The provisions of the Statute (Article 8(2)(b)(iv)), which reflect the prohibitions of IHL, require commanders to consider both at the time of planning the attack *and* during the attack that the attack is not indiscriminate and disproportionate. As provided for in Additional Protocol I, Article 57, a commander is under a duty to cease an attack that is causing excessive civilian losses.[115] It must at least have been foreseeable that violence may need to be used by the IDF. The key issues are whether the IDF planned to use force to attack the vessels and whether this could ever be justified as being proportionate, and thereafter in attacking the vessels whether they regarded this conduct as proportionate in the circumstances.

112. The ICRC commentary emphasises that commanders must continuously assess the situation during combat or an operation, and must restrain their forces from committing any violation of IHL:

> *"[The commanders'] role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose.*
> *Every commander at every level has a duty to react by initiating 'such steps as are necessary to prevent such violations'. By way of example, a noncommissioned officer must intervene to restrain a soldier who is about to kill a wounded adversary or a civilian, a lieutenant must mark a protected place which he discovers in the course of his advance, a company commander is to have prisoners of war sheltered from gunfire, a battalion commander must ensure that an attack is interrupted when he finds that the objective under attack is no longer a military objective, and a regimental commander must select objectives in such a way as to avoid indiscriminate attacks."*[116]

[114] See for example, The Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission) Session Number Three, On 10.08.2010, p. 7, 36, 39 (http://www.mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/Barak-Turkel-Aug10.pdf).
[115] Geneva Conventions, Additional Protocol I, Article 57(2)(b) provides that: "*an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.*"
[116] ICRC Commentary of 1987 on Geneva Convention, Additional Protocol I, Article 87(3).

113. These standards were recognised in the Palmer Report which found that the IDF "*should have reassessed its options when the resistance to the initial boarding attempt became apparent*."[117]

114. These are all important legal and factual considerations which the Prosecutor disregarded in finding that *"the information is insufficient to conclude that they [the IDF] anticipated that the operation would result notably in ten civilian deaths on the Mavi Marmara, and therefore that the anticipated civilian impact would have been clearly excessive in relation to the anticipated military advantage of enforcement of the blockade (as to maintain its effectiveness)."*[118] This conclusion of course assumes that the Flotilla was a legitimate military objective - an issue not analysed by the Prosecutor - but is most striking in overlooking the evidence of the deliberate nature of the attack on the civilian passengers. Even if the excessive use of force was not anticipated by the IDF (which is disputed on the available evidence), this must have become evident to the IDF when the attack started, and yet the attack was not stopped - even when passengers tried to surrender.

115. Instead, the Prosecutor gives deference to the conclusions of the Turkel report which records that the IDF denied that any live rounds were fired from the helicopters[119], that the soldiers faced fierce resistance when boarding, and that the IDF never anticipated at the time of planning the attack that excessive force would be used. The Prosecutor should have resisted placing reliance on this report to the exclusion of evidence that was supplied to her by the Applicant and which was available from other sources including the two UN reports. The autopsy reports alone, for example, indicate that persons were shot from above.[120] The damage to the Mavi Marmara is also consistent with firing downwards from the helicopters and with excessive force being used on boarding.[121]

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[117] Palmer Report, para. para. 4(vi)(a)-(b).
[118] The Decision, para. 109.
[119] See, The Decision, para. 41.
[120] See, UNHRC Report, p. 2-30; Palmer Report, para. 122; Annex 1 hereto; Supplemental Submissions, Attachment A (Annex 2 hereton). See also for example, medical reports within Supplemental Submissions, Attachment B, p. 54, 82, 87.
[121] See for example, Palmer Report, para. 122.

116. The Prosecutor should also be aware that the Turkel report has been heavily criticised including by Amnesty International for its "failure to account for the deaths [which] reinforces the view that the Israeli authorities are unwilling or incapable of delivering accountability for abuses of international law committed by Israeli forces."[122] The value of the conclusions reached by the Turkel Commission have been seriously questioned:

- "*The Commission's report notes the limitations of the evidence on which its analysis was based, but it is far from clear that it made sufficient efforts to obtain additional evidence and testimonies during its seven-month investigation*[123] … *The Commission heard testimony from only two of the more than 700 passengers and crew on the flotilla ... it appeared to make only half-hearted attempts to secure their testimony, and made no effort to utilize the extensive eyewitness testimony collected by the International Fact-Finding Mission, with which Israel refused to co-operate*."[124]

- "*The Commission noted that it did not have access to autopsy reports for those killed during the raid" but "there is no indication that the Commission requested the autopsy reports, as the International Fact-Finding Mission did*."[125]

- "*Highly contentious legal arguments were used by the Commission to argue for the applicability of international humanitarian law to the raid" that effectively argued "that these activists could be shot dead lawfully whether or not they were posing a direct threat to the lives of IDF soldiers*."[126]

117. These are factors that the Prosecutor should have taken into account when assessing the veracity of the conclusions reached by the Turkel Commission. In any event, cven if there is more than one interpretation of all of the available information at this stage, there is no need for the evidence to be conclusive in order for the Prosecutor to open an investigation. It is during

[122] Amnesty International Public Statement: Document – Israel / Occupied Palestinian Territories: Israeli Inquiry into Gaza Flotilla Deaths no More than a 'White Wash', 28 January 2011 (hereinafter "Amnesty Statement of 28 January 2011")
(http://www.amnesty.org/en/library/asset/MDE15/013/2011/en/96e848bd-56ee-4e6e-a817-17e07c3d5192/mde150132011en.html).
[123] Amnesty Statement of 28 January 2011.
[124] Amnesty Statement of 28 January 2011.
[125] Amnesty Statement of 28 January 2011.
[126] Amnesty Statement of 28 January 2011.

the investigation that the Prosecutor would have to examine in detail the conclusions of the Turkel Commission as compared to the statements from the victims and other evidence. As the Applicant emphasised in its representations to the Prosecutor, the evidence submitted "should be taken at its 'highest' at this stage and considered on the basis of whether at least one reasonable interpretation of the material shows that crimes could have been committed, leaving aside any jurisdictional or substantive defences that may be raised in due course."[127]

118. The Chamber should also have in mind that there is an extensive body of evidence of cruel and abusive treatment of the passengers once they arrived in Israel. The Prosecutor concluded that she could not take this evidence into account as it did not occur on board the vessels. However, even if she cannot seek charges for any specific crimes committed on Israeli territory, the evidence of the continuing actions of the IDF in transporting the detained passengers to Israel and maintaining their captivity, can of course be considered in assessing the motives, mental state and actions of the perpetrators of crimes on the vessels. It is relevant to whether the IDF were just acting in self-defence (as claimed by the IDF and Turkel) or were targeting civilians:

- [REDACTED] stated that "*They took us off the ship one by one. They took me off the ship and searched me from top to bottom. Then three soldiers carried me to an empty tent and ordered me to get undressed. They searched me while I was completely naked. They searched me this way at least 13 times within five hours. During the search, they talked and laughed, which made me feel utterly insulted.*"[128]

- [REDACTED] stated that on arriving in Ashdod "*I was taken to another strong tent by four of the soldiers, in that are they totally strip searched me, because after that I was nearly interrogated for one hour, they put their fingers on the pressure points, soon as you delay an answer they would put pressure on the pressure points*."[129]

[127] Supplemental Submissions, para. 14.
[128] Statement of [REDACTED] (5 July 2010).
[129] Statement of [REDACTED] (10 October 2013).

- [REDACTED] stated that "*At the airport our passports were held by the Israelis but they did not have my passport. They gave me a piece of paper in Hebrew. During the time we were in the airport one of my colleagues Manuel an Italian journalist was asking for his passport. He was sworn at and insulted by the immigration officers. I objected to his treatment and we (three of us) were assaulted, kicked and beaten and handcuffed and taken to different corners of the room. During the attack in the airport I constantly repeated that I needed to speak to my consulate and legal access. They ignored and laughed at my requests. Two females were mocking the British consulate by imitating an English accent saying 'Hello sir, how can we help you?' I felt my British nationality to be completely disrespected*."[130]

- [REDACTED] stated that "*We arrived at the airport and they seated us in an area and while we were sitting there I was with Bulent Yildirim, with Captain Mahmut sitting next to them and a gentleman Paul Larudy was being abused, an American. He had a bruise, a black eye; the Israelis were pulling at him. He was screaming and protesting. We got up to protest against this abuse. When we stood up the Israeli police came to us and one of them hit me over the head right here and blood started coming down my face.*"[131]

119. The Palmer Report found that "mistreatment continued once the vessels had docked at the Israeli port of Ashdod and passengers had been disembarked" and in the "period up until their deportation". The report confirms that passengers were "Pushed, shoved, kicked and beaten, with numerous cases of severe beatings at Ben Gurion airport; Subjected to verbal and physical harassment, intimidation and humiliation; Interrogated, with interrogations secretly filmed without consent … Forced to sign incriminating statements … Strip-searched or inappropriately frisked … subjected to sleep deprivation."[132]

120. It is significant that there is evidence of Arab and Turkish passengers being singled out for much worse treatment when compared with how western passengers were treated. The Prosecutor makes no reference to it at all. Yet, it is plainly an aggravating factor:

[130] Statement of [REDACTED] (10 June 2010).
[131] Statement of [REDACTED] (10 October 2013).
[132] Palmer Report, para. 41.

- [REDACTED], a British citizen, stated that "*Perhaps because the soldiers had found me with the wounded men or perhaps because I am white skinned, the soldiers were more lenient with me than the other people I noticed.*"[133]

- [REDACTED], a British citizen, stated that "*I also felt guilt at receiving 'preferential treatment' from the Israeli commandos due to me not being Arab, Turkish or Muslim. I watched the Isareli woman commando handcuff passengers as we came out of the saloon and onto the deck – and it felt that she was uncomfortable with cuffing me in a way that she wasn't when she was cuffing the Turkish women ahead of me – and that's why I think she left my cuffs loosened. I felt ashamed, complicit and guilty that I was being singled out for preferential treatment – while others were suffering far more than I was.*"[134]

- [REDACTED], a British citizen, stated that **"***I was taken to Beer Sheva prison where I was initially placed in a cell with some Turkish Muslim passengers. I was then moved to a room with the Caucasian passengers who included a Swedish Jewish doctor, a Greek captain, a Palestinian doctor who worked in Greece and one other Swedish national.*" [135]

- [REDACTED], a British citizen, stated that "*They kept asking me ¨Where are you from?¨ and I told them ¨I am from London, England¨ and they started to imitate the Queen and they insulted her. And they kept asking me ¨Where are you really from?¨ and I said ¨London, England¨ But that was not what they wanted to hear because of my skin color.*"[136]

121. The Prosecutor contends that serious crimes were confined only to passengers on the Mavi Marmara and did not occur on any of the other vessels. This is contrary to the evidence which she should have reviewed. It shows that similar crimes occurred on other vessels of the Flotilla. For example, testimonies from passengers on the Challenger I documented abuse including tight hand cuffing, hooding, pushing the faces of women passengers into glass, shooting several women at close range with paint ball guns including in the face, and the "attitude of the Israeli soldiers was very, verbally abusive"[137]:

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[133] Statement of [REDACTED] (30 August 2014).
[134] Statement of [REDACTED] (18 September 2013).
[135] Statement of [REDACTED] (4 December 2014) whose evidence is also referred to in the Lightbown Report.
[136] Statement of [REDACTED] (6 November 2012).
[137] Statement of [REDACTED] cited to in the Supplemental Submissions, Annex 1, notes 1, 2, 4, 5, 7, 11, 12, 13, 15.

- [REDACTED], a US citizen, stated that: *"We had people on the edge of the boat, on the railings of the boat. The Israeli soldiers jumped over and pushed, no first they fired paintballs directly at the face of the people on the railing, one of the woman on the outside of the boat was hit between the eyes, right at the bridge of her nose, almost knocking her eye out, getting her nose and suddenly bloods falling everywhere.*"
  "*The commandos jumped onto the boat and took two of the women that were standing on the side and throw them immediately down into the glass that were fallen from the windows on the deck of the ship and held their faces into the glass so their face was cut. They then took the two women up and put hoods over their heads and put cuffs on them and carried them to the bow, to the front of the ship*."[138]

- [REDACTED] stated that: "*the zodic came closer. When they were about 2-3 meters away they started shooting. Having just seen what happened on the Mavi Marmara I turned around like this. Luckily they shot with rubber bullets and paint bullets. And I got six in my back and my lower back. Then I stood up and I saw them shooting again. And they hit the person next to me one meter away between the nose. I do not know with what but it was really really bleeding*."[139]

122. The Human Rights Council fact-finding mission report provides details of abuses and mistreatment on each of the seven ships within the Flotilla.[140] It underscores the mission's "concern[] with the nature of the force used by the Israeli forces in the interception of the three further vessels in the flotilla: *Challenger 1, Sfendoni* and the *Eleftheri Mesogios*" and states that "[o]n each of the vessels some of the passengers merely used passive resistance techniques – placing their bodies in the paths of the Israeli soldiers – as symbolic gesture in opposition to the respective boarding. However, in securing control of these vessels the Israeli forces used significant force, including stun grenades, electroshock weapons, soft-baton charges fired at close range, paintballs, plastic bullets and physical force. This resulted in a number of injuries to passengers including burns, bruises, hematomas and fractures."[141]

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[138] Statement of [REDACTED] cited to in the Supplemental Submissions, Annex 1, notes 1, 2, 4, 5, 7, 11, 12, 13, 15.
[139] Statement of [REDACTED] cited to in the Supplemental Submissions, Annex 1, notes 1, 2, 4, 5, 6, 7, 8, 12, 13, 15, 17, 18, 20, 21.
[140] See, UNHRC Report, paras. 112-161.
[141] UNHRC Report, para. 173.

123. A final aggravating factor regarding the manner of the commission of the crimes, which the Prosecutor did not mention at all, is that there is evidence to show that the Israeli forces sought to conceal their crimes by confiscating all recordings of their actions.

124. The statement of [REDACTED] explains that "*when the soldiers entered the first thing they did was to remove all the CCTV cameras that belonged to the ship*."[142] The report of the UN Human Rights Council fact-finding mission concluded that these actions were a deliberate attempt by the IDF to destroy evidence of crimes committed:

> "*Amongst the items confiscated and not returned by the Israeli authorities is a large amount of video and photographic footage that was recorded on electronic and other media by passengers, including many professional journalists, on board the vessels of the flotilla. This includes a large number of photographic and video material of the Israeli assault and interception on the Mavi Marmara and other vessels. The Israeli authorities have subsequently released a very limited amount of this for public access, in an edited form, but the vast majority has remained in the private control of the Israeli authorities. The Mission is satisfied that this represents a deliberate attempt by the Israeli authorities to suppress or destroy evidence and other information related to the events of 31 May on the Mavi Marmara and other vessels of the flotilla.*"[143]

***Impact of the alleged crimes***

125. The Prosecutor made fundamental errors in assessing the impact of the crimes.[144] She found that the conduct of the IDF did not have a significant impact on the civilian population in Gaza because the supplies carried by the vessels were ultimately later distributed in Gaza. The Prosecutor reasoned that the Situation was less serious because the attack on the Flotilla could not be considered as blocking the delivery of essential humanitarian supplies to the civilians of Gaza.[145]

[142] Statement of [REDACTED] (6 November 2012).
[143] UNHRC Report, paras. 240-241.
[144] The Decision, para. 141-148.
[145] The Decision, para. 141.

126. This is an astonishingly narrow interpretation of the impact of the attack. The Prosecutor failed to recognise that none of the vessels was able to deliver any aid because there is clear evidence that they were violently attacked and everyone on board was forcibly arrested and taken to prison in Israel. The key point is that there was arguably no justification to attack the Flotilla, that the attack was unlawful from the beginning. This is an argument not acknowledged at all by the Prosecutor, which is surprising given that both UN inquiries highlighted it.[146] The cargo was all humanitarian aid, the passengers were unarmed, and there appears to be no reason violently to attack the Flotilla, at least in the manner in which it was attacked. That in and of itself is an aggravating feature that should have been taken into account.

127. Such deliberately aggressive acts would have undoubtedly had an impact on civilians living in Gaza who allegedly face the same violence on a regular basis as a result of the Israeli occupation and military incursions into Gaza. The evidence shows that the attack on the Flotilla is yet another example of the excessive use of force by the IDF against civilians in their campaign to control the territory and civilians of Gaza. This is at least an interpretation of the facts which the Prosecution should have acknowledged and which should, even if disputed by the IDF, be investigated by the Prosecutor. There are of course defences that may be advanced by the IDF, but the Prosecutor can leave such matters to Defence Counsel if any charges were to be brought. For now, she should perform her role as a prosecutor to investigate the allegations of criminal conduct.

128. As noted above, the Prosecutor found that there is a reasonable basis to believe that civilian objects were attacked unlawfully, despite the fact that the lawfulness of the blockade is asserted by the IDF. The Prosecutor should have adopted exactly the same approach in assessing the true impact of the crimes committed on board the vessels.

[146] See for example, UNHRC Report, para. 262; Palmer Report, para. 47.

129. The Prosecutor seeks to distinguish the *Abu Garda* case by arguing that "the alleged crimes committed during the flotilla incident are of a different nature and do not have a corresponding qualitative impact" and "[i]n particular, the alleged crimes committed do not involve similar aggravating factors."[147]

130. The Flotilla was of course not a UN or AU mission; however, this in no way diminishes the seriousness of attacking unarmed civilians on the high seas who were seeking to deliver humanitarian aid despite the blockade imposed by Israel. The Prosecutor should have taken into account that this blockade has been strongly condemned by the ICRC, the guardian of International Humanitarian Law, and various bodies of the UN as a fundamental breach of international law which is wholly disproportionate and which collectively punishes and harms the civilians of Gaza. The Prosecutor does not even mention these findings in her Decision:

- The UN Human Rights Council's fact-finding mission found that "*The Mission considers that one of the principal motives behind the imposition of the blockade was a desire to punish the people of the Gaza Strip for having elected Hamas. The combination of this motive and the effect of the restrictions on the Gaza Strip leave no doubt that Israel's actions and policies amount to collective punishment as defined by international law. In this connection, the Mission supports the findings of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, the report of the United Nations Fact-Finding Mission on the Gaza Conflict and most recently the ICRC that the blockade amounts to collective punishment in violation of Israel's obligations under international humanitarian law*."[148]

- It is noted in the UNHRC report that on 14 June 2010 the ICRC "*described the impact of the closure on the situation in Gaza as 'devastating' for the 1.5 million people living there, emphasizing that 'the closure constitutes a collective punishment imposed in clear violation of Israel's obligations under international humanitarian law', saying the only sustainable solution was a lifting of the closure*."[149]

[147] The Decision, para. 146.
[148] UNHRC Report, para. 54.
[149] UNHRC Report, para. 38.

131. It is irrational to conclude in these circumstances that the single attack on peacekeepers in Darfur is more serious as an international crime than the attack on the Flotilla. The Prosecutor has completely overlooked the international attention given to the Flotilla attack and the conflict of which it forms a part. It certainly cannot be distinguished from the Haskanita case and be seen as having less of an impact on this basis. The UN Security Council itself acknowledged that the attack on the Flotilla could affect the prospects of peace and security in the region, and called for restraint by the parties.[150] Indeed, the Prosecutor has recognised the highly controversial nature of the situation, and that there is much international concern for Gaza, and yet she has failed to regard these features as ones which heighten the gravity of the Situation.

132. Instead, the Prosecutor seeks to distinguish the international concern for the civilian population in Gaza from the crimes that were committed on the Flotilla.[151] The Applicant submits that this legal approach is erroneous and irrational. It is a wholly artificial way of seeking to assess gravity. It is unimaginable that a reasonable prosecutor, for example, in South Africa, were she hypothetically only to have had jurisdiction over President Mandela's unlawful imprisonment, would refuse to take account of the wider context of the system of apartheid and the reason for his detention. In the same way, it is irrational and unjustified for the Prosecutor to disregard entirely the reason for the attack on the Flotilla and alleged wider plan and policy of which it formed a part.

133. As noted above, the Prosecutor concluded that it was a mitigating factor that the aid was delivered in the end. She thus accepted that the wider context of what happened beyond the attack was relevant to her gravity determination. And yet she refused to consider the international concern for the humanitarian plight of Gaza, which is part of this same wider context, in assessing the gravity of the Situation. It is irrational, illogical, and grossly

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[150] Security Council Condemns Acts Resulting in Civilian Deaths during Israeli Operation against Gaza-Bound Aid Convoy, Calls for Investigation, in Presidential Statement, UN Website, 31 May 2010 (http://www.un.org/press/en/2010/sc9940.doc.htm).
[151] The Decision, paras. 26, 147.

inconsistent only to look to the wider context for mitigating features but not for any aggravating factors that would have required the Prosecutor to open an investigation. As set out in the Prosecution's policy paper on Preliminary Examination, "the Office must *focus its efforts objectively* on those most responsible for the most serious crimes within the situation in a *consistent manner*, irrespective of the States or parties involved or the person(s) or group(s) concerned."[152]

134. It is arguable that the acts of the IDF on the Flotilla would have sent a clear message to those in Gaza that the occupation of Gaza was in full force and that even if humanitarian aid was to get through to the Gaza, its delivery would be controlled and supervised by the Israeli authorities, and could be stopped at any point. Such an impact on the civilian population of Gaza must at least be comparable with the effects on peacekeeping of the single attack in Haskanita, Darfur.

135. It also must be considered as an aggravating feature that there have been no prosecutions for any of the alleged crimes committed, as noted above. The negative impact of the crimes on the victims, and more widely on the citizens of Gaza, is surely increased by such impunity. It only promotes the view that the IDF can act without restraint in controlling Gaza and will go unpunished, and even without any investigation when the ICC has jurisdiction over the alleged crimes.

**The Prosecutor now has jurisdiction over the Gaza occupation and conflict since June 2014**

136. The Applicant submits that the Prosecutor should now reconsider whether to open an investigation in the present Situation given that she has now has jurisdiction from 13 June 2014 over the Gaza occupation and conflict. This is plainly a new fact and circumstance which permits the Prosecutor to reconsider her decision pursuant to Article 53(4).

[152] OTP, Policy Paper on Preliminary Examinations, November 2013, para. 66 (emphasis added).

137. As noted above, on the basis of the Prosecutor's own approach that she can only consider conduct over which she has jurisdiction even to assess gravity, she can now take into account whether the IDF's conduct from June 2014 is related to the attack on the Flotilla in order to enforce the blockade, and whether the present Situation forms part of a wider plan or policy or large-scale commission of such crimes over a period of time.

138. A reconsideration ruling by the Chamber on any of the grounds set out above would permit the Prosecutor to re-examine the present Situation in light of her inquiries in the Preliminary Examination of the Palestine Situation and any investigations which may follow.

**CONCLUSION**

139. The Applicant State Party submits that the grounds set out herein provide a compelling basis for the Chamber to request the Prosecutor to reconsider the Decision.

140. The Prosecutor has selectively and inconsistently excluded any consideration of the key and determinative factors that provide a reasonable basis to believe that the crimes are of sufficient gravity to proceed with an investigation. She has demonstrably misapplied this standard of proof when characterising the offences, assessing whether they form part of a plan or policy or pattern, and in determining their seriousness.

141. Moreover, the Prosecutor has not taken into account the relevant aggravating factors when assessing the crimes. She has ignored obviously relevant evidence, and relied only on mitigating factors. She has reached premature conclusions on crucial matters, which was unnecessary at this stage of the proceedings, and which are based on a partial selection of the available information.

142. For all of these reasons, the Applicant State Party respectfully requests the Chamber to direct the Prosecutor to reconsider the Decision in respect of all or any of the issues identified for review.

**Sir Geoffrey Nice QC**
**Rodney Dixon QC**

**Counsel on behalf of the Government of the Union of the Comoros**

Dated 29 January 2015
The Hague,
The Netherlands.