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PRE-TRIAL CHAMBER I

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

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

Public

**Victims' Response
to the "Application for Judicial Review by the Government of the Comoros"
of 2 March 2020**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims, acting as Legal Representative of a group of victims (the “Principal Counsel”)¹ supports the “Application for Judicial Review by the Government of the Comoros (the “Application”),² filed on 2 March 2020.

2. She concurs with all the arguments presented by the Union of the Comoros in relation to (i) the possibility for the Pre-Trial Chamber to review the Prosecutor’s 2019 decision not to open an investigation in light of the fact that it was not carried out properly;³ and (ii) the grounds for review.⁴ In this regard, the Principal Counsel submits that the Prosecutor did not perform a complete and comprehensive re-evaluation of all the material in her possession as ordered by the Pre-Trial and Appeals Chambers. In fact, the review decision at stake, demonstrates once more the unwillingness of the Prosecutor to properly consider the evidence and disregard the directions of the Chambers.

3. Victims seek justice and truth and indicate that they feel that justice is repeatedly being denied to them. They believe that justice entails respect for the rule of law and the orders and directions of a court of law. Therefore, for them, the Prosecutor’s attitude is highly disappointing and regrettable. It is even more regrettable that the failure to genuinely engage with the evidence available and truly carry out a reconsideration exercise has resulted in further litigation and even a call for sanctions to solve the procedural stalemate.

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

² See the “Application for Judicial Review by the Government of the Union of the Comoros”, [No. ICC-01/13-100](#), 2 March 2020 (the “Application”).

³ *Idem*, paras. 18-25.

⁴ *Idem*, paras. 26-104.

4. Given the comprehensive and detailed submissions of the Union of the Comoros, including the identification of the specific errors committed by the Prosecutor in her 2 December 2019 Review, the Principal Counsel focuses on further factual elements and arguments which fully support the Application.

5. The Principal Counsel also concurs with the fact that the errors identified must be corrected and remedied. While she agrees, in principle, that sanctions should be imposed to admonish the Prosecutor's resistance to comply with the Chambers' orders, the Principal Counsel posits that any sanction eventually imposed should be effective, corrective and remedial and should take into account the loss of time and disappointment resulting from the Prosecutor's failure to properly follow the Chamber's guidance.

6. In this regard, some Victims have expressed the view that the Pre-Trial Chamber should put an end to the on-going remanding of the matter to the Prosecutor and questioned why the Chamber cannot substitute its decision for that of the Prosecutor in such an exceptional instance in which there is a clear impasse. For the Victims this is the only way of resolving the matter, particularly in light of the Court's obligation to fight impunity.

7. The Principal Counsel echoes the concerns expressed by the Victims she represents that requiring the Prosecutor to *again* review her decision would not lead to resolving the impasse but only to further, significant delays. Therefore, she suggests that the Pre-Trial Chamber should use its inherent powers to resolve the matter determinatively as a form of 'sanction' for the Prosecutor's repeated resistance to implementing judicial orders and directions. This approach would also avoid additional and arguably significant delays that would flow from either a new request by the Chamber to the Prosecutor to reconsider her last decision or the appointment of

an *amicus* prosecutor. Said approach also appears to be in line with the intent of the drafters of the Statute as discussed *infra*.

8. Indeed, and unfortunately, the legal texts of the Court do not provide for an adequate sanction in the circumstances. In fact, on the one hand, the imposition of a fine pursuant to article 71 of the Statute and rule 171 of the Rules of Procedure and Evidence (the “Rules”) would only be symbolic and not achieve the intended purpose of ensuring that the proceedings move forward so that Victims may have a real chance to seek justice. On the other hand, the proposal by the Union of the Comoros, of appointing an *ad hoc* prosecutor, also appears inapt to contribute achieving some progress in the proceedings because any conclusion by said ‘*amicus curiae*’ will not be binding upon the Prosecutor.

II. PROCEDURAL HISTORY

9. On 16 July 2015, Pre-Trial Chamber I (the “Chamber”), by Majority, granted the Application for review from the Union of the Comoros, requesting the Prosecutor to reconsider her decision of 6 November 2014 not to initiate an investigation relating to the incidents allegedly committed from 31 May 2010 through 5 June 2010 on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia bound for the Gaza Strip (the “2015 Decision”).⁵

10. On 29 November 2017, the Prosecutor notified the Chamber of her further decision not to initiate an investigation in the situation (the “29 November 2017 Review”).⁶

⁵ See the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation” (Pre-Trial Chamber I), [No. ICC-01/13-34](#), 16 July 2015 (the “2015 Decision”).

⁶ See the “Annex 1 to the Notice of Prosecutor’s Final Decision under Rule 108(3)”, [No. ICC-01/13-57-Anx1](#), 30 November 2017 (the “29 November 2017 Review”).

11. On 23 February 2018, the Union of the Comoros filed a further “Application for Judicial Review by the Government of the Union of the Comoros”,⁷ of the 29 November 2017 Review.

12. On 15 November 2018, the Chamber rendered its “Decision on the “Application for Judicial Review by the Government of the Union of the Comoros” (the “2018 Decision”) finding, *inter alia*, that “the 29 November 2017 decision cannot be considered to be final within the meaning of rule 108(3) of the Rules”.⁸ Consequently, it requested the Prosecutor to reconsider her decision of 6 November 2014 in accordance with the its 2015 Decision; and to “notify the Chamber and those participating in the proceedings of her final decision no later than Wednesday 15 May 2019”.⁹ On 21 November 2018, the Prosecutor filed a request for leave to appeal the 2018 Decision.¹⁰

14. On 18 January 2019, the Chamber partly granted leave to appeal, certifying two of the three issues put forth by the Prosecutor.¹¹

15. On 25 January 2019, the Appeals Chamber granted the Prosecutor’s request for extension of time and page limits,¹² imparting corresponding extensions to the

⁷ See the “Application for Judicial Review by the Government of the Union of the Comoros”, with Confidential Annexes 1-3, No. ICC-01/13-58-Conf, 26 February 2018. A public redacted version was made available on the same day, see [No. ICC-01/13-58-Red](#).

⁸ See the “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’” (Pre-Trial Chamber I), [No. ICC-01/13-68](#), 15 November 2018 (the “2018 Decision”), p. 45.

⁹ *Idem*, paras. 120-121.

¹⁰ See the “Request for Leave to Appeal the ‘Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’”, [No. ICC-01/13-69](#), 21 January 2019.

¹¹ See the “Decision on the Prosecutor’s request for leave to appeal the ‘Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’” (Pre-Trial Chamber I), [No. ICC-01/13-73](#), 18 January 2019.

¹² See the “Decision on the Prosecutor’s request for extension of page limit and extension of time limit” (Appeals Chamber), [No. ICC-01/13-80](#), 25 January 2019, paras. 11 and 15. See also, the “Prosecution’s omnibus request for extension of pages, extension of time, and suspensive effect”, [No. ICC-01/13-74](#), 21 January 2019; the “Response on behalf of the Government of the Union of the Comoros to the ‘Prosecution’s omnibus request for extension of pages, extension of time, and

other participants,¹³ and informing that “a decision on the Prosecutor’s request for suspensive effect will be issued separately”.¹⁴

16. On 31 January 2019, the Appeals Chamber rejected the Prosecutor’s request for suspensive effect.¹⁵

17. On 2 September 2019, the Appeals Chamber affirmed the 2018 Decision,¹⁶ directed the Prosecutor to conduct a second review of her decision not to investigate into the situation, and to notify those participating in the proceedings of her conclusion by 2 December 2019.¹⁷ Importantly, the Appeals Chamber ruled that “where the pre-trial chamber requests reconsideration of the Prosecutor’s decision not to investigate on the basis of its interpretation of the applicable law, the **Prosecutor is bound to follow this interpretation**. Furthermore, the **Prosecutor is bound to adhere to any directions of the pre-trial chamber to consider certain available information**. In addition, when assessing gravity, **the Prosecutor is obliged to follow any directions of the pre-trial chamber to take into account certain factors or information relating thereto**”.¹⁸

18. On 2 December 2019, the Prosecutor submitted her “Notice of Prosecutor’s Final Decision under rule 108(3), as revised and refiled in accordance with the Pre-Trial Chamber’s request of 15 November 2018 and the Appeals Chamber’s

suspensive effect”, [No. ICC-01/13-79](#), 24 January 2019; the “Response of the Victims to the Prosecution’s omnibus request for extension of pages, extension of time, and suspensive effect”, [No. ICC-01/13-78](#), 24 January 2019; and the “Victims’ response to the Prosecution’s Omnibus Request”, [No. ICC-01/13-77](#), 24 January 2019.

¹³ See the “Decision on the Prosecutor’s request for extension of page limit and extension of time limit”, *supra* note 12, paras. 11 and 16.

¹⁴ *Idem*, para. 6.

¹⁵ See the “Decision on the Prosecutor’s request for suspensive effect” (Appeals Chamber), [No. ICC-01/13-81](#), 31 January 2019, para. 12.

¹⁶ See the “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’”, [No. ICC-01/13-98](#), 2 September 2019 (the “2019 Judgment”).

¹⁷ *Idem*, para. 96.

¹⁸ *Idem*, para. 82. Emphasis added.

Judgment of 2 September 2019”,¹⁹ maintaining her previous decision not to open an investigation into the situation.

19. On 2 March 2020, the Union of the Comoros moved once more for judicial review and requested (i) sanctions to be imposed against the Prosecutor for her “*deliberate refusal to comply with an oral or written direction by the Court*”;²⁰ and (ii) the appointment of an *amicus* prosecutor to reconsider the decision to end the stalemate situation in these proceedings.²¹

20. On 17 March 2020, the Prosecutor asked for an extension of time limit justified by the impact on her activities of the measures taken as a result of the COVID-19 pandemic (the “Request”).²²

21. On 18 March 2020, both teams of Legal Representatives of Victims²³ and the Union of the Comoros²⁴ filed their responses supporting the Request.

22. On 19 March 2020, the Chamber granted the Request, setting the new deadlines to file responses for the Legal Representatives of Victims and for the Prosecution on 4 and 11 May 2020 respectively, and on 26 May 2020 for the referring State to file its reply.²⁵

¹⁹ See the “Notice of Prosecutor’s Final Decision under rule 108(3), as revised and refiled in accordance with the Pre-Trial Chamber’s request of 15 November 2018 and the Appeals Chamber’s Judgment of 2 September 2019” containing the “Final Decision of the Prosecutor concerning the ‘Article 53(1) Report’ (ICC-01/13-6-AnxA), dated 6 November 2014, as revised and refiled in accordance with the Pre-Trial Chamber’s request of 15 November 2018 and the Appeals Chamber’s judgment of 2 September 2019”, [No. ICC-01/13-99-Anx1](#), 2 December 2019 (the “2 December 2019 Review”).

²⁰ See the Application, *supra* note 2, para. 123.

²¹ *Idem*, paras. 126-129.

²² See the “Urgent Request for an Extension of Time”, [No. 01/13-102](#), 17 March 2020, paras. 3-4 (the “Request”).

²³ See the “Victims’ Response to the ‘Prosecution’s Urgent Request for an Extension of Time’”, [No. ICC-01/13-103](#), 18 March 2020 and the “Response of the Victims to the ‘Prosecution’s Urgent Request for an Extension of Time’”, [No. ICC-01/13-105](#), 18 March 2020.

²⁴ See the “Response of the Government of the Comoros to the ‘Prosecution’s Urgent Request for an Extension of Time’”, [No. ICC-01/13-104](#), 18 March 2020.

²⁵ See the “Decision on the Prosecution’s urgent request for an extension of time” (Pre-Trial Chamber I), [No. 01/13-106](#), 19 March 2020, p. 5.

III. ON THE INCORRECTNESS OF THE SECOND REVIEW

23. At the outset, the Principal Counsel notes that, regrettably, she has to support a third request for judicial review by the Union of the Comoros because the Prosecutor, once again, did not carry out a genuine reconsideration of her initial decision not to open an investigation into the situation. The Prosecutor has increasingly taken an untenable position on the evidence and Victims' statements available to her since the Union of the Comoros' referral in 2013. With every review, the Prosecutor has put more efforts into defending her initial (and erroneous) position, rather than following the Chamber's orders to meaningfully reassess the available evidence. Had she done so, the assessment would have inevitably led her to conclude that there is a need to open an investigation.

24. This attitude has concretely resulted in prolonged and unnecessary litigation, three requests for judicial review, orders from both the Pre-Trial and the Appeals Chamber, and disappointment and discouragement on the side of the Victims who still wait for justice ten years after the events. Having obtained a ruling in their favour from the Appeals Chamber, confirming the Chamber's position, Victims hoped to finally see the investigation into the events they suffered from opened, and, perhaps, seeing persons they deem responsible being brought before the Court.

25. Instead, the Prosecutor found a way, in the Victims' words, to rid herself of the matter; simply "maintain[ing] her view that there is not a reasonable basis to proceed, because there is no potential case arising from this situation that is sufficiently grave, within the meaning of articles 17(1)(d) and 53(1)(b) of the Statute".²⁶ This statement quite fittingly sums up the choice by the Prosecutor to only conduct a cosmetic and

²⁶ See the 2 December 2019 Review, *supra* note 19, para. 4. Emphasis added.

superficial review of her previous assessment disregarding once more the Chamber's directions she was ordered to comply with.

26. From the manner in which the Prosecutor carried out her latest 'reconsideration' it is fair to conclude that she did not perform a complete and comprehensive re-evaluation of all the material in her possession as ordered. Indeed, in the 2 December 2019 Review the Prosecutor concludes that she had already previously correctly appreciated all facts which were merely misunderstood by the Chamber. This approach is contrary to the order of the Appeals Chamber to conduct a comprehensive *re-assessment of the entire record* in light of and *applying* the legal findings of the Pre-Trial Chamber.

27. In this regard, the Principal Counsel agrees with the Union of the Comoros that the Prosecutor repeatedly failed to apply the 'reasonable basis to proceed' standard as interpreted as a matter of law by the Chamber in its 2015 Decision,²⁷ and unjustifiably applied an incorrect standard of review,²⁸ continued to draw premature deductions²⁹ and unreasonably reached determinative conclusions,³⁰ rather than finding that, in the event of uncertainty as of the facts, an investigation was needed.

28. In light of the comprehensive and detailed submissions of the Union of the Comoros, including the identification of the specific errors committed by the Prosecutor in her 2 December 2019 Review, the Principal Counsel supplements the referring State's submissions, focussing on some factual matters and on the Victims' accounts which appear to have been constantly ignored by the Prosecutor despite having a significant impact on the erroneous gravity assessment and on the result of her review.

²⁷ See the Application, *supra* note 2, paras. 4, 27-28.

²⁸ *Idem*, para. 36.

²⁹ *Idem*, e.g., paras. 42, 48, 98.

³⁰ *Idem*, e.g., paras. 55-56, 76, 78-79.

29. In relation, for instance, to the use of live ammunition, as rightly pointed out by the Union of the Comoros,³¹ the Prosecutor's finding is entirely unreasonable given the numerous Victims' statements that clearly and consistently indicate live fire before boarding of the ship. In this regard, in the 2 December 2019 Review, the Prosecutor states having revised

"[her] position [...] and accepts, for the purpose of the gravity analysis that live rounds may have been fired on a more than isolated and exceptional basis in the period of approximately three minutes before the IDF attempted for the second time to board the Mavi Marmara. This possibility is taken into account by the Prosecutor in considering whether the identified crimes were committed according to a plan or policy.

In particular, the Prosecution had expressed the view in 2017 that even if it were accepted arguendo that some IDF soldiers did open fire with live ammunition before the troops set foot on the upper deck of the Mavi Marmara, [...] this does not establish a reasonable basis to believe that, in the circumstances, the identified crimes were committed according to a plan or policy.

There are, as well, other consideration, suggested by the available information which would appear to be inconsistent with the existence of a plan or policy to commit the identified crimes, or at least any such plan or policy which was widely accepted among the relevant IDF soldiers beyond those directly implicated in the identified crimes. These factual considerations, which are not at this stage reasonably in dispute include:

- *With one possibly exception, the identified instances of wilful killing and wilful causing of serious injury occurred in the context of the passengers' violent resistance against the IDF boarders;*
- *The IDF appear to have acted reasonably in initially seeking to board the Mavi Marmara by surprise. Only when the first attempt was repulsed was a second attempt made to board the Mavi Marmara from the air, and only in the context of this second attempt is it alleged that live fire was used prior to the IDF troops setting foot on the deck;*
- *In this second boarding attempt, which was successful, the IDF appears to have made extensive use of 'less lethal' weapons and tactics, and may have adopted a graduated approach to the use of force in response to resistance. In particular, it does not seem to have employed lethal force*

³¹ *Idem*, paras. 85 et seq.

from the outset, as such a tactic would likely have prevented the initial members of the boarding party to be overpowered by the passengers as in fact occurred;

- *After the boarding, once the Mavi Marmara had been secured, and after some hiatus, the IDF seems to have made a good faith effort to provide medical treatment to passengers, including carrying out medical evacuations”.*³²

30. The above excerpts show that the Prosecutor erred in both her methodology and findings. First, the revised position of now ‘accepting’ that live ammunition *may have been used* seems nothing but window-dressing, because, immediately after making said statement, the Prosecutor refers to her 2014 assessment and position taken in 2017. Second, all of the *factual considerations* listed in the above passage are firmly contested by the Victims and it is quite concerning that this factor is still not adequately considered by the Prosecutor.³³ Claiming that said facts are ‘not reasonably in dispute’ is therefore entirely incorrect and evidences the failure to consider conflicting accounts of the events. Indeed, the fact that there are divergent views on said *factual considerations* precisely calls for the opening of an investigation, a result which would have been in line with the Chamber’s directions. Third, and notably, the basis for said *factual considerations* is essentially the 2014 assessment, which should have been revised for the second time. Fourth, said *factual considerations* are directly contradicted by numerous Victims’ accounts which should have been properly taken into account in the new revision. Had the Prosecutor properly evaluated said information, the conclusion reached would have been entirely different.

³² See the 2 December 2019 Review, *supra* note 19, paras. 63-65.

³³ In this regard, the Principal Counsel endorses the Union of the Comoros observations that it is most concerning that the Prosecutor sees to “*demote and discredit*” the victims of the crimes without ever investigating their accounts or interviewing them. See the Application, *supra* note 2, para. 90.

31. In order to illustrate how fundamentally flawed the Prosecutor's analysis on the issue of the use of live ammunition is, it suffices to recall that Victims explained *verbatim*:

- (i) *When the attack started our cameras were recording. Suddenly there were bullets everywhere and the Israeli soldiers started to fire also from the helicopters. I saw how [name of victim] was killed by gunshots from the helicopter. At this time, in the upper deck, ten people were perforated by bullets; some died, some of them were seriously injured. [...] They fired randomly at everyone without mercy.*³⁴
- (ii) *Soldiers on helicopters were targeting and shooting passengers on our ship. In only a few minutes people were wounded and killed.*³⁵
- (iii) *I was lying on the lower front part of the Mavi Marmara. When we wanted to see what was happening at the front part of the ship the soldiers fired from above, I was shot below my waist and because of this shot my bones broke. I know that I was on target when they shot me because I saw the red laser on me. [...] I saw how my friends were shot. I saw how people were running around to save their lives.*³⁶
- (iv) *They invaded the ship and started firing from above. I actually saw many people being shot. They directed laser beams at us.*³⁷
- (v) *[...] Then several helicopters appeared above and started to throw grenades. This was followed by shooting with real bullets. When the soldiers landed on our ship, they started to shoot frantically.*³⁸

³⁴ See the statement of a/40024/13 contained in the victim application form.

³⁵ See the statement of a/40025/13 contained in the victim application form.

³⁶ See the statement of a/40040/13 contained in the victim application form.

³⁷ See the statement of a/40046/13 contained in the victim application form.

³⁸ See the statement of a/40052/13 contained in the victim application form.

- (vi) *They directly started shooting sound and smoke bombs and also fired both plastic and live ammunition. I felt that a piece of the bombs had lodged into my legs, knees and arms. The soldiers were firing bullets onto the deck from the helicopters. After the helicopters became visible, I heard someone calling out for help as they screamed 'there are dead and wounded people upstairs, please help' [...] the captain had his hands up and was screaming in English to the soldiers on the other side the following words 'OK we surrender, do not shoot.' It was at that moment that the soldiers started to shoot at the windows once again. I had dived outside and was shot by fire that was aimed from the top level. I was hit in my back and leg. The firing came from the upper level.³⁹*
- (vii) *[...] The Israeli soldiers surrounded our ship with helicopters and military boats and invaded our ship – the Mavi Marmara. They threw smoke, gas and stun grenades and shot from the helicopters and military boats. One of the soldiers aimed and shot my left thigh.⁴⁰*
- (viii) *I witnessed live ammunition being used on us by them. When I had seen a real bullet wound on the foot of a journalist friend of mine, I realised that they were using real bullets on us.⁴¹*
- (ix) *Our ship was surrounded by storm boats and helicopters. They started to throw stun grenades and shoot randomly. As a result of the firing, I was shot into my right arm and leg.⁴²*
- (x) *The Israeli soldiers started to fire at our boat from helicopters and boats and approached us. They were throwing sound and gas bombs and were firing live ammunition. Soldiers started to descend from the helicopters and were shooting at the*

³⁹ See the statement of a/40070/13 contained in the victim application form.

⁴⁰ See the statement of a/40133/13 contained in the victim application form.

⁴¹ See the statement of a/05028/14 contained in the victim application form.

⁴² See the statement of a/05034/14 contained in the victim application form.

passengers on the top deck at the same time. There were many who were injured and killed at that moment [...] some of the wounded eventually passed away because of the severe blood loss.⁴³

- (xi) *Israeli war ships, helicopters and zodiac boats surrounded us and started to attack the Mavi Marmara. While soldiers on the boats continuously shot, the helicopters lowered soldiers onto the ship. Shooting started coming from the helicopters, too. [...] I was on the top deck. I was shot into my leg during the first minutes. My knee felt as if it were shredded into pieces. I lost so much blood that, apparently, I fainted.⁴⁴*
- (xii) *I was on the top deck when the attack started. [...] They started to throw stun and smoke grenades and were shooting as well. One of those bullets came directly at me, yet I was lucky enough to survive as the bullets hit my belt. The soldiers climbed down the ropes and jumped onto deck. Many people were shot upstairs, the whole deck was drenched in blood. [...] I could see laser beams on people. The soldiers were shooting from very close distances. [...] so many people had been shot in only a few minutes, therefore I actually thought they would kill us all and sink the ship.⁴⁵*
- (xiii) *They were trying to climb onto our ship from zodiac boats, and fast-roping down from helicopters simultaneous. They started firing randomly as soon as they set foot aboard. At first, I thought they were using rubber bullets but when I saw the first person wounded and his injured arm, I realised that it was live ammunition.⁴⁶*
- (xiv) *They also shot from the helicopter and threw other kinds of bombs. I heard the sound of explosives and gunshots. [...] I could see that the soldiers on the helicopters were shooting people on board.⁴⁷*

⁴³ See the statement of a/05036/14 contained in the victim application form.

⁴⁴ See the statement of a/05056/14 contained in the victim application form.

⁴⁵ See the statement of a/05070/14 contained in the victim application form.

⁴⁶ See the statement of a/15050/15 contained in the victim application form.

⁴⁷ See the statement of a/15101/15 contained in the victim application form.

- (xv) *A helicopter approached and while the soldiers started to open fire at us, they were also trying to climb down onto our boat. As a result of the fire that was opened on us I saw [name of victim] get shot in the head and fall down. There was blood everywhere.*⁴⁸
- (xvi) *The Israeli soldiers were attacking the boat with their helicopters and zodiacs and trying to board our boat. At the same time, they were throwing smoke and gas bombs and firing with live ammunition. They were also shooting from the helicopters. [...] many people were injured during those moments.*⁴⁹
- (xvii) *During the attack time, I was on the second floor at the second saloon. I went up and helped wounded people. Israeli soldiers started to attack us first with zodiac boats. As we understood from the wounded, Israeli soldiers used plastic bullets. And then helicopters showed up and landed soldiers down the Mavi Marmara. At that point they used real bullets. Some of our friends got injured or killed because of the real bullets. Some of our friends took their shirt off and waved it as a white flag. But they continued the gun fire. [...] Too many people were shot in their back while they were running away from the Israeli soldiers.*⁵⁰
- (xviii) *[Victim's name] was about 4-5 metres away from me. He was taking photos. They shot him in his forehead. People around me were wounded. The staircase was full of wounded people. [...] The Israeli soldiers kept shooting for about an hour and a half. After they took charge of the ship they abused us all.*⁵¹
- (xix) *[Victim's name] was also a journalist. When the attack started he went out of the broadcasting room with his camera. It was really crowded that's why he used the shutter to get some pictures. In this moment he was shot directly in his forehead.*⁵²

⁴⁸ See the statement of a/15130/15 contained in the victim application form.

⁴⁹ See the statement of a/15137/15 contained in the victim application form.

⁵⁰ See the statement of a/15222/15 contained in the victim application form.

⁵¹ See the statement of a/40015/13 contained in the victim application form.

⁵² See the statement of a/40024/13 contained in the victim application form.

32. Despite these clear and converging statements, the Prosecutor maintains her earlier position finding that “[n]othing in the available information suggests that all IDF troops who took part in the boarding were involved in any plan or policy to commit the identified crimes, nor that such a plan or policy was necessarily known to or shared by IDF troops other than those who took part in the boarding. To the contrary, even if the conflicting accounts may not negate the existence of a plan or policy altogether, for current purposes, they necessarily suggest that its scope was, to some degree, confined”. This conclusion is manifestly unreasonable, because clearly contradicted by the Victims’ accounts, and because engages in speculation about the motives and *modus operandi* that the IDF could have or may have employed. In this regard, the Chamber specifically directed the Prosecutor not to engage in speculation, and recalled that “*the presumption of article 53(1) of the Statute, as reflected in the word ‘shall’ in the chapeau of that article, and of common sense, is that the Prosecutor investigates in order to properly assess relevant the facts*”.⁵³

33. The Prosecutor’s reasoning is even more erroneous since, as also argued by the Union of the Comoros,⁵⁴ it fails to take adequately into account evidence of physical mistreatment, capable of amounting to torture and inhuman treatment. The accounts of overly-tight handcuffing, exposing passengers to direct sun light for many hours while denying them access to water, food, medicine, and toilet facilities is a common thread running through all the statements of the 80 clients represented by the Principal Counsel.

34. It is worth recalling but a few declarations to illustrate the kind of information totally ignored by the Prosecutor in the 2 December 2019 Review:

⁵³ See the 2015 Decision, *supra* note 5, para. 13.

⁵⁴ See the Application, *supra* note 2, paras. 59-65.

- (i) [...] They even handcuffed the wounded on stretchers that could not even raise a finger. A man who was wounded in his abdomen and had heavy blood loss died. He could have been saved if treated earlier.⁵⁵
- (ii) Although I was wounded, my hands were tightly handcuffed from the back. They ordered me to go down on my knees like the others while I was wounded. When I tried to explain that I couldn't bend my knees because I was shot, they dragged me on my arms and took me to the top deck. [...] Then they tightly handcuffed my hands again. For 12 hours my hands were handcuffed and my right leg wounded. [...] and all the other wounded people were forced to stay like that for all these hours.⁵⁶
- (iii) After a while, the soldiers took over the boat and they handcuffed everyone with plastic handcuffs very tightly. They took us up to the top deck and searched us in an unacceptable and [sic] inhumanitarian way. They cuffed my hands very tightly and made us wait on the top deck, kneeled down in that position for 9-10 hours. They did not give us water or let us use the toilet [...] They did not let any medical intervention happen for the wounded as they made them wait for a very long time in that way. Some were losing a lot of a blood. [...] But while they were taking the wounded up to the top deck, they continued to assault and beat them. Some of the wounded passed away during this time from blood loss.⁵⁷
- (iv) Once they captured the whole ship they handcuffed us all. While handcuffing us they searched us, took our belongings including our money, swore at us and spat into our faces. I was kicked in the back upon asking a soldier to loosen my handcuffs. Another spat into my face when I asked to go to the toilet.⁵⁸

⁵⁵ See the statement of a/15050/15 contained in the victim application form.

⁵⁶ See the statement of a/40070/13 contained in the victim application form.

⁵⁷ See the statement of a/05036/14 contained in the victim application form.

⁵⁸ See the statement of a/05070/14 contained in the victim application form.

- (v) *They handcuffed me from behind and kicked and punched me. [...] We were forced to sit on the wet ground covered with broken glass. I saw a man whose arm was injured. They handcuffed him to his belt. [...] They did not allow us to use the toilets. The wounded passengers were not allowed to receive any kind of treatment.*⁵⁹
- (vi) *We were kicked and punched when we asked to go to the toilet.*⁶⁰
- (vii) *The handcuffed us from behind using plastic handcuffs. They took us onto the upper deck. They made us sit on our knees on the wet floors. We remained in this position for close to 10 hours. We were not given water, food or allowed to go to the toilet. The helicopter's propeller squirted water on us.*⁶¹

35. Moreover, the Prosecutor again engages in speculation regarding the extent of the victimisation while, at the same time, failing to properly consider the Victims' accounts, as demonstrated by the statement that: *"While a large number of the passengers aboard the Mavi Marmara may have been subject to one or more aspects of this treatment in the course of the voyage to Ashdod, a much smaller group appears to have been subject to all or most of these forms of mistreatment. In particular, while handcuffing and restriction of movement around the Mavi Marmara appears to have been applied to relatively large numbers of people, reports of direct violence appear to be less widespread"*.⁶²

36. The Prosecutor's resistance to engaging in a genuine assessment of the evidence and material in her possession which would clearly militate in favour of an investigation because of the uncertainty surrounding the circumstances of the commission of the crimes, is even clearer when she refers simply to the 'margin of appreciation' recognised by the majority of the Appeals Chamber to provide any

⁵⁹ See the statement of a/40025/13 contained in the victim application form.

⁶⁰ See the statement of a/40046/13 contained in the victim application form.

⁶¹ See the statement of a/40135/13 contained in the victim application form.

⁶² See the 2 December 2019 Review, *supra* note 19, para. 38.

reason or explanation for her assessment, or to the fact that she *had already* correctly considered a specific element or fact previously.⁶³

37. Additionally, the Principal Counsel supports the Union of the Comoros' arguments in relation to the Prosecutor's wilful failure to take into account the evidence on cruel and abusive treatment of the passengers once disembarked at the Ashdod port.⁶⁴ In fact, after having been ordered to re-consider her decision in light of the Chamber's directions, it was not open to the Prosecutor to ignore said evidence in her subsequent review. While the Chamber had held that rules of jurisdiction do not permit the Court to conduct proceedings in relation to possible crimes committed elsewhere than on the three vessels, the Court has nonetheless the authority to consider all necessary information, including extra-jurisdictional facts for the purpose of establishing the alleged commission of crimes within its competence, as well as their gravity.⁶⁵ Therefore, it can reasonably be concluded that the Prosecutor erroneously failed to consider the evidence and the numerous Victims' accounts as regards the ill-treatment of the passengers on Israeli territory.

38. The Principal Counsel further concurs with the Union of the Comoros that the Prosecutor failed to take into account the significant impact of the crimes on the lives of the Victims and their families;⁶⁶ and that it was insufficient and erroneous not to provide a reasoned determination on this point.⁶⁷

39. In this regard, the statements of the 400 Victims participating in the proceedings⁶⁸ are compelling and could not have been reasonably disregarded by the

⁶³ See *e.g.*, the 2 December 2019 Review, *supra* note 19, paras. 42, 45-46, 50, and 61-62. See also, the Application, *supra* note 2, para. 68.

⁶⁴ See the Application, *supra* note 2, paras. 92 *et seq.*

⁶⁵ See the 2015 Decision, *supra* note 5, para. 17.

⁶⁶ See the Application, *supra* note 2, para. 66.

⁶⁷ *Idem*, para. 68.

⁶⁸ *Ibid.*

Prosecutor - had she taken them into due consideration -, as shown by the following accounts from some of the clients represented by the Principal Counsel:

- (i) *Upon my return to [...] I was diagnosed with PTSD. In order to be able to function and continue working, I have been having on-going therapy, once a week to help me deal with the PTSD, which often felt overwhelming. [...] At the time of the attack on the Mavi Marmara, I dealt with the fear that I was feeling by emotionally disconnecting. [...] I could not believe that there were dead bodies on the floor. I saw blood and heard bullets. [...] On my return, I felt guilty for surviving when others had died. [...] I became cold, disconnected and withdrawn – which impacted upon not only myself but also family and friends. [...] I could not look after myself and had serious problems sleeping. [...] I find it particularly difficult if I am exposed to things that trigger memories unexpectedly, such as images, gunfire or feeling trapped.⁶⁹*
- (ii) *[Victim name] with whom I had run out of the press room was shot in the forehead [...] Seeing the corps of someone that I highly respected and with whom I had been together five minutes ago is a sorrow that I will never forget for the rest of my life.⁷⁰*
- (iii) *It took a long time for me to handle all that happened and I had to get psychotherapy.⁷¹*
- (iv) *Two of my daughters left school after this terrible event, while my son went through a depression and decided to leave the country. The murder of my husband has destroyed our family and our lives.⁷²*
- (v) *One of the soldiers aimed at me and shot my left thigh. [...] I was wounded and suffered for a long time after I returned home. I witnessed many friends being shot. Today, I still suffer emotionally when I remember that day.⁷³*

⁶⁹ See the statement of a/40018/13 contained in the victim application form.

⁷⁰ See the statement of a/15050/15 contained in the victim application form.

⁷¹ See the statement of a/40024/13 contained in the victim application form.

⁷² See the statement of a/40103/13 contained in the victim application form.

- (vi) *I witnessed [name of victim] being shot, he is still in a coma. [Name of victim] was shot in front of me. [Name of victim] was beaten in front of me until he had brain trauma. The nerves in my left arm have sustained perpetual injuries.*⁷⁴
- (vii) *All these images from the attack influenced my life.*⁷⁵
- (viii) *Due to all the blows I received I developed problems with my brain. All of the bruises and assaults have been documented by the Forensic Institute. I still have not been able to rid myself of the psychological scars this event has left me with. I used anti-depressants for a very long time and have still not been cured.*⁷⁶
- (ix) *I was psychologically affected by this whole attack. When I came to Istanbul to give my testimony I had to go to the Psychiatric hospital. The doctor put me on anti-depressant pills.*⁷⁷
- (x) *I have mental injuries left from the attack. Even if I was not physically injured during the attack, I saw how people were bleeding and the bodies of the killed people who had just the aim of going to help people in need. I witnesses so much that it was not easy for me to live with these pictures in my head.*⁷⁸
- (xi) *The fact that the Israeli soldiers were pointing their rifles at my defenceless baby son and threatening to kill him [...] still haunts my memory. My son was only 1 year old when this happened. I was really afraid they would kill him.*⁷⁹

40. It is hard to fathom how accounts like those cited above and the ones quoted by the referring State⁸⁰ could not have been considered and given due weight in the

⁷³ See the statement of a/40133/13 contained in the victim application form.

⁷⁴ See the statement of a/05010/14 contained in the victim application form.

⁷⁵ See the statement of a/40040/13 contained in the victim application form.

⁷⁶ See the statement of a/05036/14 contained in the victim application form.

⁷⁷ See the statement of a/05070/14 contained in the victim application form.

⁷⁸ See the statement of a/15026/15 contained in the victim application form.

⁷⁹ See the statement of a/15098/15 contained in the victim application form.

2 December 2019 Review. The Prosecutor not only adheres to her previous assessment, but further, and once more, fails to acknowledge the important number of Victims who have been suffering significant harm as a result of the events, and/or the continuous impact of said events on their lives. Importantly, the events suffered still have a significant impact in the vast majority of the Victims' life, including the distress of not being able to secure their rights to justice and truth.

41. Instead of considering both their accounts and the sheer number of Victims, the Prosecution is at pains to justify "*that it is not necessarily true that any potential case arising from this situation will encompass all the victimisation which has been identified in the situation as a whole,*" referencing her previous assessment⁸¹ that is, and was, based on pure speculation. The significant number and nature of Victims' accounts could only have led to the conclusion that an investigation is necessary and in the interests of justice. At this juncture, it should also be recalled that there is no requirement under the Rome Statute that cases potentially arising out of a situation – let alone an investigation – need to cover *all* victimisation in a single case.

42. Therefore, the Principal Counsel posits that the conclusions drawn in the 2 December 2019 Review are untenable in so far as they are baseless and demonstrate the absence of a genuine re-consideration by the Prosecutor of her previous assessment as directed by the Chamber and confirmed by the Appeals Chamber.

43. Consequently, the Principal Counsel concurs with the Union of the Comoros that the errors committed by the Prosecutor must be corrected and remedied in order for Victims to have a chance of seeing their quest for justice pursued before the Court.

⁸⁰ See the Application, *supra* note 2, para. 68.

⁸¹ See the 2 December 2019 Review, *supra* note 19, para. 25.

IV. ON SANCTIONS AND REMEDIES

44. The Principal Counsel agrees with the referring State that, in principle, sanctions should be imposed in the circumstances to admonish the repeated - and what appears to be deliberate - non-compliance by the Prosecutor with judicial orders. However, she posits that any sanction eventually imposed should be effective, corrective and remedial and should take into account the loss of time and disappointment resulting from the Prosecutor's failure to follow the Chamber's guidance.

45. As indicated above, Victims have expressed concerns about the effectiveness of sanctions pursuant to article 71 of the Statute and rule 171 of the Rules, as well as scepticism about the suggestion of appointing an *amicus* prosecutor under rule 103 of the Rules.

46. As for the imposition of sanctions, theoretically, the most feasible option seems to be the imposition of a fine. However, said sanction would not lead to any tangible results in terms of the proceedings at hand and in fact would substruct resources from a possible investigation, therefore being prejudicial to the interests of the Victims who wish resources to be fully available for an investigation instead. The other sanctions provided for in the Court's legal texts do not seem to be appropriate or feasible in the circumstances.

47. As far as the appointment of an *amicus* prosecutor pursuant to rule 103 of the Rules is concerned, this proposal does not seem apt to move the proceedings beyond the deadlock they are currently in because the conclusion of the *amicus* would not have any binding effect. Indeed, the person eventually appointed could simply assist or advise the Chamber providing views; and he or she would certainly reach the conclusion already reached by both the Pre-Trial and Appeals Chambers, specifically

that the Prosecutor misapprehended or disregarded the evidence before her. Conducting such a non-binding review would be time-intensive and would not serve the purpose of either sanctioning the Prosecutor for her non-compliance with judicial orders, or addressing the Victims' main concern, namely that an investigation into the situation be finally opened.

48. Moreover, the Statute does not provide for the appointment of an independent prosecutor to take over any function of the ICC Prosecutor as such. Since article 71 of the Statute refers to the "*removal from the courtroom*" of the person or persons who commit misconduct, including disruption of Court's proceedings or deliberate refusal to comply with Court's directions, the actual application of the provision – though not impossible – appears less than clear-cut. Likewise, rule 171 of the Rules does not provide for any satisfactory remedy in the circumstances. Neither a fine,⁸² nor an order to interdict the Prosecutor from exercising her functions for 30 days or more⁸³ would ultimately be beneficial to the further conduct of the proceedings, or the interests of the Victims.

49. The only way in which the suggestion of appointing an independent prosecutor could be achieved would be by interpreting the terms of article 71 of the Statute and rules 170 and 171 of the Rules very broadly, so as to not confine it to the physical space of the 'courtroom' but, rather, by placing emphasis on the *misconduct* that *disrupts the proceedings*. If the Prosecutor were to be 'removed' from the proceedings, her outstanding obligation to genuinely review the decision as ordered by the Appeals Chamber would not be achieved, unless the matter could be transferred to an independent prosecutor who would carry out the review with a binding outcome, similar to the function of the independent prosecutor envisaged by the *ad hoc* international tribunals in relation to the investigation of offences against

⁸² See Rule 171(4) of the Rules.

⁸³ See Rule 171(1)-(3) of the Rules.

the administration of justice.⁸⁴ Thus, only the appointment of an independent prosecutor to carry out the reconsideration *in lieu of* the ICC Prosecutor would possibly and in the abstract achieve any significant result in the present proceedings. This possibility is, however, not foreseen in the statutory framework of the Court.

50. The Principal Counsel is acutely aware of the fact that such a procedure would necessitate an unprecedented interpretation of the legal provisions that could potentially go far beyond what was envisaged by the drafters of the Statute. At the same time, it cannot be over-stressed that a remedy must be found to overcome the

⁸⁴ Rule 77 of the 50th amended version of the Rules of Procedure and Evidence of the ICTY (8 July 2015) stipulates in the relevant part: “(A) *The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice [...]* (C) *When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may: (i) direct the Prosecutor to investigate with a view to the preparation and submission of an indictment for contempt; (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest in respect to the relevant conduct, direct the Registrar to appoint an amicus curiae to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; [...]*” (emphasis added). The ICTR Rules of Procedure and Evidence contains a similar provision (see Rule 77). The Rules of Procedure and Evidence of the ICTY and of the ICTR are available at the following addresses:

http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf and <http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>.

An analogous provision is also contained in the most recently amended Rules of Procedure and Evidence of the Mechanism for International Criminal Tribunals (the “MICT”) of 26 September 2016. MICT Rule 90 of Rules of Procedure and Evidence provides “(A) *The Mechanism in its exercise of its inherent power may, with respect to proceedings before the ICTY, the ICTR, or the Mechanism, hold in contempt those who knowingly and wilfully interfere with the administration of justice, [...]* (C) *When a Chamber or a Single Judge has reason to believe that a person may be in contempt of the ICTY, the ICTR, or the Mechanism, it shall refer the matter to the President who shall designate a Single Judge who may: (i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt; (ii) where the Prosecutor, in the view of the Single Judge, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an amicus curiae to investigate the matter and report back to the Single Judge to whether there are sufficient grounds for instigating contempt proceedings; [...]*”. The Rules of Procedure and Evidence of the MICT are available at the following address: <http://www.unmict.org/sites/default/files/documents/160926-rules-rev2-en.pdf>. See also ICTY, *In the Case Against Hartmann*, Case No. IT-02-54-R77.5, [Order in Lieu of an Indictment on Contempt](#) (Specially Appointed Trial Chamber), 27 August 2008, p. 3; ICTY, *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, [Decision on Allegations of Contempt](#), 21 January 2009; ICTY, *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, [Public Redacted Version of Second Decision on Prosecution’s Motion Under Rule 77 Concerning Further Breaches of Protective Measures \(Three Books\) Issued on 3 February 2010](#), 4 February 2010; ⁸⁴ ICTR, *Prosecutor v. Augustin Ndirabatware*, Case No. ICTR-99-54-T, [Decision on Prosecution Oral Motion for Rule 77 Investigation Related to Witness ANAF](#), 30 October 2009; ICTR, *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, [Decision on Prosecutor’s Confidential Motion to Investigate BTH for False Testimony](#), 14 May 2008.

current impasse; otherwise, parties, participants, and, most importantly, the Prosecutor could actively disrupt or terminate proceedings simply by disregarding Chambers' orders and/or commit other forms of non-compliance. Ultimately, the fairness of the proceedings and, most importantly, the Victims would pay the price.

51. In the *Bemba et al.* and *Lubanga* cases,⁸⁵ Chambers looked at the procedural and investigative possibilities relating to conduct in contempt of court. Said cases, however, concerned article 70 of the Statute – requiring the investigation of alleged contempt – rather than article 71 which deals 'only' with misconduct. Nevertheless, the examples are instructive. Indeed, in the *Lubanga* case, the relevant Chamber did not *per se* exclude the appointment of an 'independent investigator'; arguably with the full-fledged rights and duties as ordinarily conferred upon the ICC Prosecutor. In particular, the Chamber stated that

*"The Registrar is not given any authority to investigate alleged offences in this or any other context and the role of the Pre-Trial and Trial Chambers as regards Article 70 offences, is essentially limited to the opportunity to communicate relevant information to the Prosecutor for his consideration. Given the extent to which this scheme has been regulated in the Rome Statute framework, it is clear that the Judges have not been given the power to remove responsibility from the Prosecution by appointing an independent investigator. Clearly, if a team prosecuting a case were to find itself placed in a position of conflict when investigation or prosecuting alleged Article 70 offences, it would then be necessary to refer the issue either to members of the OTP who were uninvolved with the proceedings or, in an extreme situation, to an independent investigator".*⁸⁶

52. *Arguendo* the circumstances of a six years stalemate in the present proceedings could perhaps fulfil the requirements of such an *extreme situation* and the appointment of an independent prosecutor could be envisaged despite the fact that

⁸⁵ See the "Decision on the requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the entire OTP staff" (Appeals Chamber), [No. ICC-01/05-01/13-648-Red3](#), 21 October 2014 (the "*Bemba et al.* Decision"), para 40. See also, the transcript of the hearing held on 14 April 2011 in the *Lubanga* case, [No. ICC-01/04-01/06-T-350-Red2-ENG](#), p. 17, lines 7-19.

⁸⁶ See the transcript of the hearing held on 14 April 2011, [No. ICC-01/04-01/06-T-350-Red2-ENG](#), p. 17, lines 7-19.

said measure is not as such foreseen in the statutory texts of the Court. Moreover, in the *Ruto and Sang* case, the relevant Chamber never pronounced itself on a request for an appointment of an *amicus* prosecutor to investigate staff of the Office of the Prosecutor and Prosecution's intermediaries.⁸⁷

53. The Statute only foresees two types of measures that could be taken against the Prosecutor: a fine or temporary removal under article 71 of the Statute and rule 171 of the Rules, or more drastic measures under article 42 of the Statute. The Principal Counsel posits that the latter go far beyond what would be appropriate in the present circumstances.

54. Nevertheless, one of these provisions could, to a certain extent be instructive *mutatis mutandis*. Article 42(7) of the Statute states that “[n]either the Prosecutor nor the Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground”. The provision does not offer any remedy in terms of who, instead, should be appointed in that *matter*; nor does rule 34 of the Rules provide clarity on this point. At the same time, the fact that the *matter* could be simply discontinued to be investigated, reviewed, or prosecuted because the Prosecutor or Deputy Prosecutor were removed from their functions seems incompatible with the spirit of the Statute.

55. Having carried out on two occasions a ‘review’ of the evidence and reached an unaltered conclusion, not genuinely taken into account either the evidence on the record or the directions of the Chambers, the Principal Counsel, however, submits that the impartiality of the Prosecutor in this matter can by now reasonably be doubted. Another review by her would be the same foregone conclusion. The Prosecutor’s reiteration of her unchanged stance – and even endorsement of her

⁸⁷ See the “Decision on the Ruto Counsel’s Request to appoint an Amicus Prosecutor” (Trial Chamber V(A)), [No. ICC-01/09-01/11-2034](#), 02 June 2016.

previous findings in the face of contrary directions and findings of the Chamber – which were confirmed by the Appeals Chamber – could arguably fulfil the requirements of rule 34(d) of the Rules. But the matter cannot be considered settled if a workable, just solution is not found for the Victims. Their quest for justice must not be left unattended. Someone else must assume the function of the Prosecutor under article 53 of the Statute in this exceptional and unprecedented situation.

56. The Principal Counsel posits that the obvious *lacuna* in the Statute as regards situations as the present, needs to be addressed and a legal solution for an adequate remedy found.

57. The Principal Counsel notes that in its judgment, the Appeals Chamber held that *“the pre-trial chamber’s request for reconsideration is more than just a trigger of the Prosecutor’s obligation to reconsider her decision. If the Prosecutor could ignore the basis for the pre-trial chamber’s request for reconsideration, the judicial review proceedings under article 53(3)(a) of the Statute would be meaningless. Therefore, when the Prosecutor is reconsidering her decision not to investigate upon a request by the pre-trial chamber, it will not suffice for the Prosecutor to do so in a perfunctory manner such that the authenticity of the exercise could be questioned. Rather, the Prosecutor is required to demonstrate how she addressed the relevant issues in light of the pre-trial chamber’s directions”*.⁸⁸

58. Therefore, the Principal Counsel submits that, in the event the Prosecutor fails to follow the interpretation of the relevant law by the Chamber and/or to adhere to any direction expressly provided by the latter for the assessment of the gravity threshold or of certain relevant factors or information to be taken into account thereto, the Pre-Trial Chamber should be entitled to intervene.

⁸⁸ See the 2019 Judgement, *supra* note 16, para. 77.

59. The Principal Counsel argues that the circumstances are such that the Chamber should, at this stage and in the face of the repeated non-compliance with applying its directions, use its inherent powers to finally substitute its own findings for those of the Prosecutor, as a ‘sanction’ for failing to carry out a genuine re-consideration in compliance with the judicial directions she received.⁸⁹ This approach would further avoid additional and arguably significant delays that would flow from the appointment of an independent prosecutor or eventually a further instruction by the Chamber to the Prosecutor to review her (second) decision yet another time.

60. Nothing in the Statute prevents the Pre-Trial Chamber from doing so at this juncture, given that there are no other feasible measures available at this stage. In fact, a review of the preparatory works reveals the existence of a relevant proposal – not included in the analysis by the Appeals Chamber in its Judgement of November 2015⁹⁰ - made by France in the early stages of the proceedings of the Preparatory Committee in 1996. Said proposal read as follows:

“Article 43

Reply to the closing of the case

*1. When the Prosecutor has decided not to initiate an investigation, in accordance with article 40(1)(b), or not to institute proceedings following an investigation in accordance with article 42 (1), the Preliminary Investigations Chamber may, either at the request of the State which lodged the complaint under article 37 or at the request of the Security Council, if the matter was submitted to the Court under article 38 (1), ask him to reconsider his decision. **It may do so only once**”.*⁹¹

⁸⁹ Incidentally, the Principal Counsel notes that regulation 29 of the Regulations of the Court provides for the possibility for a Chamber to issue any order it deems necessary in the interests of justice in the event of non-compliance by a participant with an order of a Chamber.

⁹⁰ See the “Decision on the admissibility of the Prosecutor’s appeal against the ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’” (Appeals Chamber), [No. ICC-01/13-51](#), 06 November 2015, paras. 61-65.

⁹¹ See the “Draft Statute of the International Criminal Court (working paper submitted by France)”, [UN Doc. A/AC.249/L.3](#), 6 August 1996, p. 39.

61. In 1997, the Preparatory Committee formally decided to include this proposal in the part dealing with investigation of the draft statute, *albeit* with a degree of modification stating:

“Article 26

Investigation of alleged crimes

*5. At the request of a complainant State or, in a case to which article 23 (1) applies, at the request of the Security Council, the Presidency [entity to be determined] shall [may] review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision [but it may do so only once]”.*⁹²

62. This draft article was further revised in the same year as follows:

“Article 26

Investigation of alleged crimes

*5. At the request of a complainant State or, in a case to which article 23, paragraph 1, applies, at the request of the Security Council, the Presidency [Pre-Trial Chamber] shall [may] review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision [but it may do so only once] [: provided that the Prosecutor, any suspect and the complainant State [or the Security Council (as the case may be)] shall be informed of such review proceedings or confirmation proceedings within the contemplation of paragraph 4 of this article which involves a decision based on considerations of the interests of justice and shall be entitled to submit his/her/their/its viewpoints with regard thereto, which viewpoints shall be considered by the Presidency, [Pre-Trial Chamber] in coming to its decision]”.*⁹³

63. This formulation was largely accepted at the meeting of the Preparatory Committee held in Zutphen (The Netherlands) and formed the basis of the draft statute of the International Criminal Court.⁹⁴ Furthermore, the mechanism described above in which a Pre-Trial Chamber would review a decision of the Prosecutor not to initiate an investigation and request the Prosecutor to reconsider the decision *only*

⁹² See the “[Abbreviated Compilation of Proposals on Procedural Matters, Preparatory Committee on the Establishment of an International Criminal Court](#)”, 4 August 1997, p. 5.

⁹³ See the “Decisions taken by the Preparatory Committee at Its Session held from 4 to 15 August 1997”, [UN Doc. A/AC.249/1997/L.8/Rev.1](#), 14 August 1997, p. 17.

⁹⁴ See the “Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands”, [UN Doc. A/AC.249/1998/L.13](#), 4 February 1998, p. 90.

once was officially included in the Draft Statute of the Court by the Preparatory Committee and ultimately presented to the Rome Conference.⁹⁵

64. Although this specific wording of the French proposal was not adopted in the final version of the Statute, such a mechanism had strong support among the drafters. Indeed, the proposal was accepted early on by the delegations of the Preparatory Committee and maintained in the Draft Statute of the Court until the last moment. It is, therefore, the Principal Counsel's submission that the drafters of the Statute foresaw the possibility of endless friction between the Prosecutor and the Pre-Trial Chamber and thus sought to limit the former's discretion over the supervisory authority of the latter.

65. Judge Eboe-Osuji, in his partly dissenting opinion to the 2019 Judgment, cautioned that “[in the Majority’s view] *all that the Pre-Trial Chamber needs do is to remain on [the side of the law] and from there hope to exert something of remote control on what the Prosecutor does in the outcome. And, the assumption continues, for as long as the Pre-Trial Chamber gives its directions as to the law in that way—and repeatedly does so, if need be—the system should work well enough. I am not convinced that this is the right instinct. For, it is a system with a built-in flaw of an eventual stalemate: in the event that the Pre-Trial Chamber and the Prosecutor may find themselves locked in an interminable loop of disputes as to whether the Prosecutor’s decisions had been compliant with the Pre-Trial Chamber’s repeated requests for reconsideration*”.⁹⁶

66. Therefore, in a situation where, as put by Judge Eboe-Osuji, the Pre-Trial Chamber and the Prosecutor find themselves “*locked in an interminable loop*”, it seems

⁹⁵ See the “Text of the Draft Statute for the International Criminal Court”, [UN Doc. A/AC.249/1998/CRP.11](#), 1 April 1998, p. 4 and “Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court”, [UN Doc. A/CONF.183/2/Add.1](#), 14 April 1998, p. 78.

⁹⁶ See the “Partly Dissenting Opinion of Judge Eboe-Osuji”, [No. ICC-01/13-98-Anx](#), 02 September 2019, para. 38.

appropriate to resort to the preparatory works of the Statute and give effect to the apparent intention of the drafters which initially sought to limit the Prosecutor's ability to continually contest the supervisory authority of the Pre-Trial Chamber. In such exceptional circumstances, the intent of the drafters should militate towards restricting the Prosecutor's ability to challenge over and over again the Pre-Trial Chamber's review.

67. The Prosecutor highly selectively considered information, came to unreasonable conclusions and applied an erroneous threshold to downplay the available evidence and prevent the opening of an investigation into a situation that was referred to her by a State Party pursuant to article 14(1) of the Statute. The Principal Counsel notes that article 14 of the Statute leaves extremely little room for the Prosecutor to refuse the opening of an investigation as indicated by the words "*a situation in which **one** or more crimes within the jurisdiction of the Court **appear** to have been committed*".⁹⁷ The Pre-Trial Chamber has repeatedly stated that there were clear indicia that crime(s) **appeared** to have been committed. Had the Prosecutor taken the Chamber's directions into account and remedied the five identified errors, there would not have been any other reasonable conclusion than to open an investigation.

68. In conclusion, the Principal Counsel advocates for an interpretation of the Court's legal framework that takes fully into account the right of Victims to truth and justice and bridges any gap in the pursuit of accountability. The Statute as a whole makes the fight against impunity the Court's very *raison d'être*. Accordingly, the Court's legal framework is based on a presumption that investigation and prosecution of international crimes are *ipso facto* in the interests of justice and should be pursued. Given the overall presumption in favour of accountability, it will be against the spirit of the Statute that a situation of impasse as the one faced in the current proceedings could not be remedied by the Pre-Trial Chamber.

⁹⁷ Emphasis added.

69. Should the Chamber not concur with the course of action proposed by the Victims to move the proceedings forward, the Victims ask that as a *minimum* the sanction of a reprimand should be imposed on the Prosecutor and the Chamber should in its ruling order the Prosecutor to consider as assessed the elements of gravity and any other element which will justify the opening of the investigation without undue delay.

Respectfully submitted.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 4th day of May 2020

At The Hague, The Netherlands