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

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

2 December 2019

Contents

Introduction

1. In 2014, the Prosecutor determined that there is not a reasonable basis to proceed with an investigation in this situation, because there is no potential case that is sufficiently grave to be admissible before this Court, in the meaning of articles 17(1)(d) and 53(1)(b) of the Statute.[1] This was without prejudice to her conclusion that, on the information made available, there *is* a reasonable basis to believe that war crimes were committed by members of the Israel Defence Forces ("IDF") in the boarding of the *Mavi Marmara*, and its aftermath, resulting in 10 fatalities, the wounding of as many as 55 people, and outrages upon the personal dignity of potentially many others during the voyage to Ashdod. Throughout these proceedings, the Prosecution has sought to underline that these victims have an internationally recognised right to a remedy, and to any extent these crimes may not be admissible before this Court, States with jurisdiction retain their primary obligation, if not discharged, to afford the victims due process and, if necessary, just satisfaction.

2. In 2015, the majority of the Pre-Trial Chamber, as it was then composed, requested the Prosecutor to reconsider her determination of the gravity of the potential case(s) arising from this situation, on the basis of five identified issues.[2] In 2017, the Prosecutor confirmed her view that there is not a reasonable basis to proceed, notwithstanding an extensive and detailed review of the available information,[3] based on her understanding of the Appeals Chamber's clarification that the "ultimate decision […] is for her."[4]

[1] ICC-01/13-6-AnxA ("Article 53(1) Report"), para.150.
[2] *See* ICC-01/13-34 ("First Article 53(3)(a) Request").
[3] *See* ICC-01/13-57-Anx1 ("Prosecutor's Final Decision (Original Version)"). *See also* ICC-01/13-T-001-ENG-ET WT ("Appeals Chamber Transcript"), p. 120:15-16 (in which the Comoros observed that it did not dispute "the thoroughness of the task that the Prosecution has performed").
[4] *See* ICC-01/13-51 OA ("Appeal Admissibility Decision"), para. 50. *See also* paras. 59 (referring to "ultimate discretion"), 62 ("ultimate decision"). *See further* ICC-01/13-98 OA2 ("Appeal Judgment"), para. 76.

3. With the benefit of the Pre-Trial Chamber's and Appeals Chamber's subsequent further rulings in 2018 and 2019,[5] clarifying the nature and extent of the requirements of rule 108(3), the Prosecutor now re-files her final decision on this situation. This is based on her reconsideration and, where appropriate, revised assessment of the information made available, in light of the five issues identified by the Pre-Trial Chamber in 2015.

4. For the reasons stated in this document, having complied with the directions of the Appeals Chamber and the Pre-Trial Chamber, the Prosecutor maintains 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. This conclusion is reached on the basis of a careful analysis, conducted in good faith, within the legal framework as it has been elaborated in this situation.

5. Before setting out its detailed reasoning in this respect, the Prosecution recalls that the more recent litigation in this situation, from 2015 to 2019, addressed procedural matters of first impression arising from the Pre-Trial Chamber's 2015 decision and its consequences. This was necessary because these matters not only related to this situation, but affected more generally the exercise of the Prosecutor's mandate under the Statute—and thus the manner in which any and all situations will come before the Court.[6] However, it follows from the procedural focus of this litigation that the binding reasoning (*ratio decidendi*) of the Court's more recent decisions does not concern the particular *facts* at issue in this situation, nor the weight to be assigned to those facts for the purpose of articles 17(1)(d) and 53(1)(b). It is these questions of fact, and of weight, which are now addressed in this document.

[5] *See* ICC-01/13-68 ("Second Article 53(3)(a) Request").
[6] *See e.g.* Appeals Chamber Transcript, pp. 12:23-13:2 ("the litigation in this situation has also touched on a number of legal issues which we consider to be of broader constitutional importance for the Court as a whole. It is our duty, as we see it, as prosecutors, who are bound to act in accordance with the Statute, to be equally mindful of those concerns since they touch upon the limits of the mandate given to us by our States Parties"). *See also* pp. 62:15-16, 103:4-8, 103:21-104:18, 135:17-19, 136:10-24, 146:8-13, 146:18-148:7.

6. The most recent judgment of the Appeals Chamber has brought this cycle of procedural litigation to an end. It determined that, for the purpose of rule 108(3), the Prosecution is bound by the legal interpretations of the Pre-Trial Chamber in an article 53(3)(a) request, even if it is not bound by the Pre-Trial Chamber's factual conclusions or its view of the weight to be assigned to certain factors for the purpose of a gravity assessment under article 53(1)(b).[7]

7. Consequently, as directed by the Appeals Chamber, the Prosecution now sets out its reasoning in which it applies the legal interpretations of the majority of the Pre-Trial Chamber (as composed in 2015) to the five issues which it had identified for the Prosecutor's reconsideration. In this regard, the Prosecution recalls the Appeals Chamber's endorsement that, taking into account "the circumstances" and the fact that "a decision on whether to initiate an investigation will be based on a variety of factors", "it is possible that, even once a legal error is corrected, the Prosecutor may still arrive at the same conclusion as before, namely not to initiate an investigation."[8]

8. The Prosecution further notes that it did not intend the 144-page original version of the Prosecutor's Final Decision to appear "perfunctory" or to raise any question about the "authenticity of the exercise".[9] Nevertheless, in this revised and refiled version, the Prosecution has adopted a different format which it hopes will be of greater assistance to the Pre-Trial Chamber and the Parties. While shorter in length, it is hoped that it is structured in a way which makes more explicit the manner in which the Prosecution has taken into account the legal analysis of the majority of the Pre-Trial Chamber (in its 2015 composition) and the way in which this analysis is relevant to the issues which have been identified as the basis for the reconsideration.

[7] *See* Appeal Judgment, paras. 78, 80-83, 90-91, 94.
[8] Appeal Judgment, para. 79.
[9] *Cf.* Appeal Judgment, para. 77.

9. Finally, the Prosecution notes that this further reconsideration is based primarily on the information made available by 6 November 2014—although nothing in the information subsequently made available would materially affect any of these conclusions. Indeed, the Prosecution has elsewhere explained why the information subsequently made available has not led the Prosecutor, in the exercise of her separate discretion under article 53(4) of the Statute, to re-open any aspect of the Report.[10] The Pre-Trial Chamber has already confirmed that the Prosecutor's previous exercise of discretion under article 53(4) of the Statute is not susceptible to judicial review at the instance of the referring State,[11] and this determination is final for the purpose of this situation as it was not subject to appeal.[12]

Reasoning

10. In 2018, Pre-Trial Chamber I, by majority, determined that the Prosecutor is not only obliged under article 53(3)(a) of the Statute to carry out a reconsideration when requested, as specified expressly in rule 108(2), but:

> Specifically, the five main errors identified by the Pre-Trial Chamber must serve as the basis for the reconsideration […] In other words, the Prosecutor must demonstrate in detail how she has assessed the relevant facts in light of the specific directions contained in the [First Article 53(3)(a) Request].[13]

11. The Appeals Chamber more recently held—in clarification of its previous decision which informed the approach of the Prosecutor's Final Decision,[14] as originally filed—that the Prosecution must apply any "legal interpretation of the pre-

[10] Prosecutor's Final Decision (Original Version), para. 333 (finding that the information made available after 6 November 2014 contains "no new fact or information which materially alters the analysis in the Report"). *See further* paras. 6, 171-331.
[11] Second Article 53(3)(a) Request, paras. 52-55.
[12] *See e.g.* Appeal Judgment, para. 84.
[13] Second Article 53(3)(a) Request, para. 117. *See also* para. 113, Disposition. *See further* First Article 53(3)(a) Request, para. 49.
[14] *See* Appeal Admissibility Decision. *See also* Prosecutor's Final Decision (Original Version), paras. 3-4 (citing the Appeal Admissibility Decision).

trial chamber" in the First Article 53(3)(a) Request, both with regard to the "interpretation of the substantive law as well as of the procedural law, for instance, in respect of the legal standards to be applied to the evaluation of evidence".[15] Yet, "different considerations apply as far as questions of fact are concerned",[16] insofar as:

> [I]t is not for the Pre-Trial Chamber to direct the Prosecutor as to how to assess this information and which factual findings she should reach. Rather, it is primarily for the Prosecutor to evaluate the information made available to her and apply the law (where relevant, as interpreted by the pre-trial chamber) to the facts found. This is consistent with the role of the Prosecutor at the preliminary investigation phase of the proceedings.[17]

12. The Appeals Chamber further explained, in the specific context of these proceedings:

> To the extent that the Prosecutor's decision is based on the assessment of gravity under article 53(1)(b) read with article 17(1) of the Statute, the Appeals Chamber notes that the assessment of gravity involves, as in the case at hand, the evaluation of numerous factors and information relating thereto, which the Prosecutor has to balance in reaching her decision. In this regard, the Appeals Chamber, by majority […], considers that the Prosecutor enjoys a margin of appreciation, which the pre-trial chamber has to respect when reviewing the Prosecutor's decision. Accordingly, the Appeals Chamber, by majority, finds that it is not the role of the pre-trial chamber to direct the Prosecutor as to what result she should reach in the gravity assessment or what weight she should assign to the individual factors. The pre-trial chamber, may however, oblige the Prosecutor to take into account certain

[15] Appeal Judgment, para. 78.
[16] Appeal Judgment, para. 80.
[17] Appeal Judgment, para. 80.

> factors and/or information relating thereto when reconsidering her decision not to initiate an investigation.[18]

13. It concluded:

> [T]he Appeals Chamber finds, by majority […], that in reviewing the [Article 53(1) Report], it was inappropriate for the Pre-Trial Chamber to direct the Prosecutor as to how to apply its interpretation of the 'reasonable basis to proceed' standard to the facts, what factual findings she should reach and to suggest the weight to be assigned to certain factors affecting the gravity assessment […]. Accordingly, the Appeals Chamber, by majority […], considers that when reconsidering her decision […], the Prosecutor is not bound by these determinations of the Pre-Trial Chamber.[19]

14. Reading these decisions together, the Prosecution will apply the legal interpretations adopted by the majority of the Pre-Trial Chamber in the First Article 53(3)(a) Request, for the purpose of this reconsideration.[20] Although these were not expressly identified by the Appeals Chamber, the Prosecution understands them to be the following:

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[18] Appeal Judgment, para. 81. *See also* para. 82 ("the pre-trial chamber may not direct the Prosecutor as to how the information made available to her should be analysed, which factual findings she should reach, how to apply the law to the available information or what weight she should attach to the different factors in the course of a gravity assessment"). *See further* para. 78 (referring to "the margin of appreciation that [the Prosecutor] enjoys in deciding whether to initiate an investigation or not"). *Contra* First Article 53(3)(a) Request, para. 15.

[19] Appeal Judgment, para. 94.

[20] While the Prosecution has duly accepted these legal interpretations of the majority of the Pre-Trial Chamber in the First Article 53(3)(a) Request for the purpose of *this* situation, it notes that this remains without prejudice to its approach in other situations. This important distinction follows from the fact that one Pre-Trial Chamber is not bound to adopt the legal reasoning of another Pre-Trial Chamber, and that consequently the parties to proceedings before such chambers may in appropriate circumstances properly submit that this is the proper course of action. *See* Statute, art. 21(2). In particular, notwithstanding its obligation under article 53(3)(a) and rule 108(2) in this situation, the Prosecution therefore respectfully maintains its view for all other purposes that the standard of proof in article 53(1) ("reasonable basis to believe") should be applied to the *legal elements* required by articles 53(1)(a) and (b), evaluating and weighing the information made available *as a whole*. This was one of the grounds on which the Prosecution sought to appeal the legal interpretations of the majority of the Pre-Trial Chamber (in 2015), and the Appeals Chamber never ruled on the merits of this question. *See e.g.* ICC-01/13-35 ("Prosecution Notice of Appeal of First Article 53(3)(a) Request"), paras. 20-23; Appeal Admissibility Decision. *See also* Prosecutor's Final Decision (Original Version), paras. 15-32.

- "If the information available to the Prosecution […] allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor shall open an investigation".[21]

- "[T]he Court has the authority to consider all necessary information, including as concerns extra-jurisdictional facts for the purpose of establishing crimes within its competence as well as their gravity."[22]

- "The Chamber recognises that the Prosecutor has discretion to open an investigation but, as mandated by article 53(1) of the Statute, that discretion expresses itself only in paragraph (c)".[23]

- "Facts which are difficult to establish, or which are unclear, or the existence of conflicting accounts, are not valid reasons not to start an investigation but rather call for the opening of such an investigation."[24]

- "[I]t is inconsistent with the wording of article 53(1) of the Statute and with the object and purpose of the Prosecutor's assessment under this provision for her to disregard available information other than when that information is manifestly false."[25]

15. In the context of these five legal interpretations, the Prosecution has reconsidered its reasoning with regard to the five issues identified by the Pre-Trial Chamber in 2015.[26] In the following paragraphs, each of these issues is addressed in

[21] First Article 53(3)(a) Request, para. 13.
[22] First Article 53(3)(a) Request, para. 17.
[23] First Article 53(3)(a) Request, para. 14.
[24] First Article 53(3)(a) Request, para. 13.
[25] First Article 53(3)(a) Request, para. 35.
[26] *See above* para. 10. *See also* First Article 53(3)(a) Request, para. 49. *See further* paras. 20-48.

turn.[27] The Prosecution acknowledges that, in some instances, its analysis remains substantially similar to that contained in the Prosecutor's Final Decision (Original Version), as well as in the initial Article 53(1) Report—but this merely reflects that the Prosecution had in these respects *already* accepted the material law and facts previously espoused by the majority of the Pre-Trial Chamber (in its 2015 composition). Where appropriate, this is explained in detail.

16. The final part of this reconsideration sets out the manner in which the five issues identified by the Pre-Trial Chamber have been weighed.[28] It is on the basis of this assessment of the weight that the Prosecutor reaffirms her conclusion that there is no potential case of sufficient gravity so as to be admissible. In reaching this conclusion, the Prosecutor adheres to the affirmation of the Appeals Chamber that, for the purpose of article 53(3)(a), the "result" reached in the "gravity assessment" and the "weight" assigned to "the individual factors" are matters for her own assessment, and where she is entitled to a margin of appreciation.[29]

I. The likely objects of any investigation

17. In the First Article 53(3)(a) Request, the majority considered that the Article 53(1) Report did not provide a "discrete analysis" of "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".[30] It further suggested that "there appears to be no reason […] to consider that an investigation […] could not lead to the prosecution of those persons who may bear the greatest responsibility for the identified crimes",[31] based on its view that this

[27] *See below* paras. 17-29 (likely objects of any investigation); 30-36 (scale of the identified crimes); 37-43 (nature of certain identified crimes); 44-54 (impact of identified crimes); 55-88 (manner of commission of the identified crimes).
[28] *See below* paras. 89-96.
[29] *See above* para. 12.
[30] First Article 53(3)(a) Request, para. 22. *See also* para. 23.
[31] First Article 53(3)(a) Request, para. 24.

question does not relate to the "seniority or hierarchical position of those who may be responsible".[32]

18. Likewise, the Prosecution is mindful of the long-established guidance by the Appeals Chamber that "no category of perpetrators is *per se* excluded from potentially being brought before the Court",[33] that "[t]he particular role of a person […] may vary considerably depending on the circumstances of the case", and that "individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes".[34]

19. The majority of the Pre-Trial Chamber (in 2015) may have understood that the Prosecution had taken the opposite approach, one that was incorrect, based on "the Prosecutor's argument at paragraph 62 of her Response [to the Comoros]".[35] This did indeed note that "the Prosecution's analysis [in the Article 53(1) Report] did not support the view that there was a reasonable basis to believe that 'senior IDF commanders and Israeli leaders' were responsible as perpetrators or planners of the apparent war crimes."[36]

20. However, the Prosecution made this remark in response to a *factual* submission by the Comoros in litigation before the Pre-Trial Chamber,[37] and this comment was never intended to represent the Prosecution's original analysis of the likely objects of any investigation.

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[32] First Article 53(3)(a) Request, para. 23.
[33] ICC-01/04-169 OA ("*DRC* Arrest Warrants Appeal Judgment"), para. 73. *See also* para. 79 ("Had the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible they could have done so expressly").
[34] *DRC* Arrest Warrants Appeal Judgment, paras. 76-77.
[35] First Article 53(3)(a) Request, para. 23.
[36] ICC-01/13-14-Red ("Initial Prosecution Response to Comoros"), para. 62.
[37] Prosecutor's Final Decision (Original Version), para. 94 (bullet 1). *See further* Initial Prosecution Response to Comoros, paras. 61 (submitting that "The Comoros is incorrect in its argument that the Prosecution was required to address expressly the views of the Comoros regarding possible perpetrators", and referring to jurisprudence which the majority of the Pre-Trial Chamber in the First Article 53(3)(a) Request endorsed as correct), 62 (fn. 134: citing paragraphs 86 and 88 of the Comoros' submissions, to which the Prosecution was responding).

21. Thus, in the Prosecution's view, the assessment of whether the potential objects of any investigation "may bear the greatest responsibility for the identified crimes" is fact-sensitive. It may be informed by factors including: the potential legal characterisation(s) of the conduct relevant to the potential case(s) under consideration (including whether the identified crime was perpetrated individually or with others); and whether or not other persons may potentially be involved in the relevant conduct, and the manner in which that involvement might be legally characterised (as accessories, superiors, etc); and so on.

22. In its initial response to the Comoros, the Prosecution clarified its view—implicit in the Article 53(1) Report—that "the potential perpetrators of the Identified Crimes were among those who carried out the boarding of the *Mavi Marmara*, and subsequent operations aboard, but not necessarily other persons further up the chain of command."[38] In the Prosecutor's Final Decision, as originally filed, the Prosecution further emphasised that indeed "such perpetrators *would be* the object of any investigation", and therefore that this had duly been taken into account.[39] There seems to be no material dispute, therefore, as to the objects of any potential investigation, insofar as the view urged by the majority of the Pre-Trial Chamber in 2015 is also the view of the Prosecution.

23. For all these reasons, the Prosecution respectfully submits that its appreciation of the likely objects of any investigation conforms to the direction of the majority in the First Article 53(3)(a) Request.

24. The Prosecution further recalls in this context that, while any investigation of the identified crimes would likely be focused upon the physical perpetrators, as the persons appearing to bear the greatest responsibility in the potential case(s) arising from the situation, such case(s) would still be of limited scope.

[38] Initial Prosecution Response to Comoros, para. 60.
[39] Prosecutor's Final Decision (Original Version), para. 94 (bullet 1, emphasis supplied). *See also* paras. 166-167.

25. In particular, having regard to the circumstances as a whole and notwithstanding the information discussed below concerning the manner of commission of the identified crimes,[40] it cannot be assumed that the same individual(s) may be established as perpetrator(s) for *all* of the identified crimes, in the meaning of article 25(3)(a) of the Statute, either directly or indirectly. Rather, the investigation may reveal a number of perpetrators, each with responsibility for only some part of the identified crimes. Moreover, identification to the requisite standard of the direct physical perpetrator(s) of the crimes of wilful killing and wilful causing of serious injury is also likely to be difficult, even with the benefit of investigation, given the particular and chaotic circumstances of the situation.

26. Furthermore, there is no information available that suggests any investigation of the crimes of wilful killing or wilful causing of serious injury would necessarily establish the responsibility of other persons as accessories for that conduct, in the meaning of articles 25(3)(b) to (d) of the Statute, or as superiors, in the meaning of article 28 of the Statute. Specifically:

- Notwithstanding the information discussed below concerning the manner of commission of the identified crimes,[41] it cannot be assumed that members of the IDF other than the perpetrator(s) of wilful killing and wilful causing of serious injury necessarily made sufficient contributions to the identified crimes with the required intent and knowledge. These crimes are not of such a nature and scope that they *necessarily* entailed the criminal complicity of others.

- Likewise, while the Prosecution notes the decision of the IDF Military Advocate General ("IDF MAG") not to investigate the identified crimes,[42] the IDF MAG appears to be a "competent authorit[y] for investigation" in the meaning of article

[40] *See below* paras. 55-88.
[41] *See below* paras. 55-88.
[42] *See* State of Israel, Public Commission to Examine the Maritime Incident of 31 May 2010 ('Turkel Commission'), *Second Report: Israel's Mechanisms for Examining and Investigating Complaints ands Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013, pp. 440-441.

28(a)(ii) and 28(b)(iii) of the Statute.[43] In this context, and on the basis of the information available, there is no reasonable basis to consider that the responsibility of the superiors of the perpetrator(s) of the identified crimes (to make a referral to the competent authorities for investigation) was not discharged. Nor does the information available suggest that, even if this responsibility was not discharged, such a failure was done with the necessary knowledge.

- Finally, notwithstanding the information discussed below concerning the manner of commission of the identified crimes,[44] there is no basis in the information available to consider that the superiors of the perpetrator(s) of the identified crimes failed prior to the boarding of the *Mavi Marmara* to take necessary and reasonable measures to prevent the identified crimes, with the necessary knowledge.

27. The Prosecution acknowledges that, with regard to the identified crime of outrages upon personal dignity, the likely objects of the investigation could potentially encompass accessories in the meaning of articles 25(3)(b) to (d), or the immediate superiors of the perpetrator(s) (aboard the *Mavi Marmara*) in the meaning of article 28. This follows from the fact that the occurrence of at least some of the forms of identified mistreatment may have been readily apparent to other IDF personnel on the ship, and yet at least appear to have been condoned.

28. The Prosecution recalls that the Comoros has suggested that "senior IDF commanders and Israeli leaders" not present on the *Mavi Marmara* were also

[43] By analogy, *see also* ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, Judgment, 19 May 2010, paras. 231 ("a civilian superior may, under some circumstances, discharge his obligation to punish an offending subordinate by reporting to the competent authorities when a crime has been committed, provided that this report is likely to trigger an investigation or initiate disciplinary or criminal proceedings"), 234 (whether a report to the appropriate authorities is sufficient "depends on the circumstances of each case": "[i]f, for instance, the superior knows that the appropriate authorities are not functioning or if he knows that a report was likely to trigger an investigation that was a sham, such a report would not be sufficient").
[44] *See below* paras. 55-88.

potentially responsible for the identified crimes.[45] However, as it has previously reported, the Prosecution does not concur that the information made available by November 2014 disclosed a reasonable basis for such a conclusion.[46] Nor did the majority of the Pre-Trial Chamber in 2015 itself entertain such a notion, or make any express direction to the Prosecution to consider this question further.

29. All of the preceding considerations are taken into account by the Prosecutor in considering the weight to be given to this factor (likely objects of any investigation) in assessing the gravity of the potential case(s) arising from this situation.[47]

II. The scale of the identified crimes

30. In the First Article 53(3)(a) Request, the majority noted that the Prosecution and the Comoros "essentially agree on the numbers of victims of the identified crimes", but expressed the view that this should have been "a compelling indicator of sufficient, and not of insufficient[,] gravity".[48] In this context, there is clearly no dispute that the victims of the identified crimes amounted to "ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity".[49] The Prosecution has previously noted that, in this respect, there is no question of fact in issue for the purpose of the gravity assessment.[50]

31. To this extent, therefore, the Prosecution respectfully submits that its appreciation of the scale of the identified crimes conforms to the direction of the majority in the First Article 53(3)(a) Request.

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[45] *See* Prosecutor's Final Decision (Original Version), para. 94 (first bullet, citing ICC-01/13-3-Red ("Request for Review"), paras. 86, 88).
[46] *See e.g.* Prosecutor's Final Decision (Original Version), paras. 94 (first bullet), 168-169. *See also* paras. 328-331. *But see above* para. 9.
[47] *See below* paras. 89-96.
[48] First Article 53(3)(a) Request, para. 26.
[49] First Article 53(3)(a) Request, para. 26.
[50] *See e.g.* Prosecutor's Final Decision (Original Version), para. 76. *See also* paras. 127-129 (noting that characterising the victims of outrages upon personal dignity as "many" of the approximately 500 passengers aboard the *Mavi Marmara* reflects the same assessment of the number of possible victims).

32. Accordingly, this consideration is taken into account by the Prosecutor in considering the weight to be given to this factor (scale of the identified crimes) in assessing the gravity of the potential case(s) arising from this situation.[51] As the Appeals Chamber has recently confirmed, however, the Pre-Trial Chamber may not direct the Prosecutor on the question of the weight given to this consideration.[52]

33. In this respect, the Prosecution further takes into account that the majority of the Pre-Trial Chamber's conclusion (in 2015) that the scale of the identified crimes weighs in favour of a finding of sufficient gravity was based on its view that:

> the scale of the crimes […] in the potential case(s) arising from [this] situation […] exceed[s] the number of casualties in actual cases that were previously not only investigated but even prosecuted by the Prosecutor (*e.g.* the cases against Bahar Idriss Abu Garda and Abdallah Banda) […].[53]

34. Yet the Prosecution notes, in light of its observations on the likely objects of any investigation or prosecution, 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.[54] For example, the person(s) responsible for some or all of the instances of wilful killing or wilful causing of serious injury may well not be the same person(s) responsible for the instances of outrages upon personal dignity.

35. Furthermore, and in any event, the Prosecution notes that the majority of the Pre-Trial Chamber in 2015 did not address the fact that the Pre-Trial Chamber in *Abu Garda* had determined that the case was sufficiently grave on the basis (among other considerations) of the "severe disrupt[ion]" caused (by the charged attacks on

[51] *See below* paras. 89-96.
[52] *See above* paras. 12-13.
[53] First Article 53(3)(a) Request, para. 26.
[54] *See above* para. 25.

peacekeepers) to their "mandated protective roles with respect to millions of Darfurian civilians in need of humanitarian aid and security".[55] On this basis, the *Abu Garda* Pre-Trial Chamber did not assess the resulting victimisation as pertaining solely to "the AMIS personnel, and […] their families" but rather also to "the local population" affected by "the alleged initial suspension and ultimate reduction of AMIS activities in the area".[56] The reasoning of the *Banda* Pre-Trial Chamber was similar in all material respects.[57]

36. By contrast, the victims of the identified crimes aboard the *Mavi Marmara* were neither peacekeepers nor humanitarian assistance workers within the meaning of article 8(2)(b)(iii) of the Statute, insofar as the Prosecution has previously found that their mission was motivated by "explicit and primary political objectives" rather than being "impartial[]" or "neutral[]".[58] On this basis, the potential case(s) arising from this situation may be distinguished from *Abu Garda* and *Banda*. The Prosecution notes that the majority of the Pre-Trial Chamber in 2015 made no comment on the Prosecution's assessment of these qualitative considerations.

III. The nature of certain identified crimes (severity of mistreatment)

37. In the First Article 53(3)(a) Request, the majority acknowledged that there is "no […] dispute" that, in addition to the identified incidents of wilful killing and wilful causing of serious injury, the identified incidents of outrages upon personal dignity were based on conduct encompassing:

> 'mistreatment' [of passengers aboard the *Mavi Marmara* during the voyage to Ashdod], including overly tight handcuffing […], beating, denial of access to toilet facilities, denial of medication […], provision of only limited access to

[55] ICC-02/05-02/09-243-Red ("*Abu Garda* Confirmation Decision"), paras. 33-34. *See also* Prosecutor's Final Decision (Original Version), paras. 77-80.
[56] *Abu Garda* Confirmation Decision, para. 33.
[57] *See* ICC-02/05-03/09-121-Corr-Red ("*Banda* Confirmation Decision"), para. 27.
[58] *See* Article 53(1) Report, para. 125. *See further* paras. 111-124. *See also* Prosecutor's Final Decision (Original Version), para. 79.

> food and drink, forcing passengers to remain kneeling on decks exposed to the sun […] seawater spray and wind gusts […], various physical and verbal harassment such as pushing, shoving, kicking, and threats and intimidation (including through the use of dogs) and blindfolding.[59]

38. In 2017, the Prosecution confirmed that there is no material difference between its view and that of the majority of the Pre-Trial Chamber (as it was composed in 2015) concerning the *types* of conduct identified as potentially amounting to outrages upon personal dignity.[60] 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,[61] reports of direct violence appear to be less widespread and to have varied significantly in nature and degree.[62]

39. To this extent, the Prosecution respectfully submits that its assessment of the nature of certain identified crimes (the factual severity of the conduct underlying the Prosecution's finding with regard to outrages upon personal dignity) conforms to the direction of the majority in the First Article 53(3)(a) Request.

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[59] First Article 53(3)(a) Request, para. 29.
[60] *See* Prosecutor's Final Decision (Original Version), paras. 83 (bullet 3), 87, 160, 293. There is not a reasonable basis to believe that other types of conduct occurred within the jurisdiction of the Court as alleged by the Comoros in the course of litigation: *see e.g.* Prosecutor's Final Decision (Original Version), paras. 163, 200, 287-291, 297-298, 300-302.
[61] *See* Prosecutor's Final Decision (Original Version), paras. 189, 202. It should be noted, however, that the numbers described here include information received after 6 November 2014. In this regard, *see further above* para. 9.
[62] *See* Prosecutor's Final Decision (Original Version), paras. 192-195. It should be noted, however, that the numbers described here include information received after 6 November 2014. In this regard, *see further above* para. 9.

40. Accordingly, this consideration is taken into account by the Prosecutor in considering the weight to be given to this factor (nature of the identified crimes) in assessing the gravity of the potential case(s) arising from this situation.[63]

41. However, in the First Article 53(3)(a) Request, the majority also reasoned that the Prosecution's "assessment of the severity of the pain and suffering inflicted by the conduct in question"—which informed the characterisation of this conduct as outrages upon personal dignity rather than inhuman treatment—"was 'surprisingly premature'" and could not be "credibly attempted on the basis of the limited information available at this stage".[64] In the majority's view, "the correct conclusion would have been to recognise that there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment were committed, and to take this into account for the assessment of the nature of the crimes as part of the gravity test".[65]

42. In its recent judgment, the Appeals Chamber identified this passage of the majority's reasons in the First Article 53(3)(a) Request as an example of when the majority had impermissibly "applied its interpretation of the 'reasonable basis to believe' standard to the facts".[66] It would follow, therefore, that no weight necessarily attaches to the possibility that the conduct identified as outrages upon personal dignity could potentially be characterised as inhuman treatment.

43. In this respect, the Prosecution only accords neutral significance to the *legal* characterisation of the identified conduct, but gives weight instead to the *factual* nature of the identified conduct, which is not materially in dispute.[67] Thus, even if the material conduct could properly be characterised as inhuman treatment, this

[63] *See below* paras. 89-96.
[64] First Article 53(3)(a) Request, para. 30.
[65] First Article 53(3)(a) Request, para. 30.
[66] Appeal Judgment, para. 92. *See further above* paras. 11-13.
[67] Prosecutor's Final Decision (Original Version), para. 83 (bullet 3). *See also* para. 87. *See further* paras. 85-86 (recalling that the 'nature' criterion was derived from the Regulations of the Office of the Prosecutor and that, consistent with the scheme of the Statute, the Prosecution does not recognise a legal hierarchy among the article 5 crimes).

would not alter the weight afforded to the 'nature' of the crime in this respect, for the purpose of assessing the gravity of the potential case(s) arising from this situation.

IV. The impact of the identified crimes

44. In the First Article 53(3)(a) Request, the majority expressed the view that the Article 53(1) Report "failed to consider that […] the significant impact of [the identified] crimes on the lives of the victims and their families is, as such, an indicator of sufficient gravity."[68]

45. In the Article 53(1) Report and the Prosecutor's Final Decision, as originally filed, the Prosecution took into account the "significant impact on victims and their families and other passengers involved", but submitted that:

> the weight afforded to this conclusion, in the circumstances, was closely related to the assessment of the 'scale' of the crimes, which—as previously stated—was relatively small compared to potential cases arising from other situations, notwithstanding the hardship and suffering caused to the persons involved.[69]

46. This approach has now been confirmed by the Appeals Chamber—which recognises that it is for the Prosecutor, within a margin of appreciation, to assess the weight of the various relevant factors for the purpose of a gravity assessment under article 53(1)(b).[70]

[68] First Article 53(3)(a) Request, para. 47.
[69] Prosecutor's Final Decision (Original Version), paras. 130-131.
[70] *See above* paras. 12-13.

47. Accordingly, the impact on direct and indirect victims is again duly taken into account by the Prosecutor in considering the weight to be given to this factor in assessing the gravity of the potential case(s) arising from this situation.[71]

48. In the First Article 53(3)(a) Request, the majority further considered that the Article 53(1) Report was erroneous because it failed to recognise that, "in light of the available information," there was a "possibility that the events at issue had an impact going beyond the suffering of the direct and indirect victims" insofar as "the commission of the identified crimes […] would have sent a clear and strong message to the people in Gaza (and beyond) that the blockade of Gaza was in full force and that even the delivery of humanitarian aid would be controlled and supervised by the Israeli authorities."[72]

49. The ultimate delivery of the humanitarian supplies to the population of Gaza has "not been challenged" in these proceedings,[73] and was not doubted by the Pre-Trial Chamber. As to the moral or political effect of the events aboard the *Mavi Marmara*, the Prosecution is "in no position to assess" the majority's view of the "symbolic importance of the identified crimes" on "an objective basis".[74] This is for the same reasons previously identified by the Appeals Chamber when it observed that "the criterion of 'social alarm' depends upon subjective and contingent reactions to crimes rather than upon their objective gravity."[75]

50. In any event, the assessment of the weight to be given to any "message" sent by the identified crimes falls within the margin of appreciation identified by the

[71] *See below* paras. 89-96.
[72] First Article 53(3)(a) Request, para. 48. The majority further suggested that "the international concern caused by the events at issue […] is somehow at odds with the Prosecutor's simplistic conclusion that the impact of the identified crimes points towards the insufficient gravity of the potential case(s) on the mere grounds that the supplies carried by the vessels in the flotilla were ultimately later distributed to the population in Gaza."
[73] Prosecutor's Final Decision (Original Version), para. 132.
[74] Prosecutor's Final Decision (Original Version), para. 133.
[75] *DRC* Arrest Warrants Appeal Judgment, para. 72.

Appeals Chamber.[76] Accordingly, the Prosecution gives this consideration minimum weight in its assessment of the gravity of the potential case(s) arising from this situation, since the effect of such a "message" cannot be assessed with any degree of reliability.

51. Furthermore, the majority of the Pre-Trial Chamber (in 2015) relied on the initiation of "several fact-finding efforts" by "States and the United Nations" as an indication of "the attention and concern" provoked by the events on the *Mavi Marmara*.[77] These efforts comprised reports prepared by the national authorities of Turkey and Israel, a report by the UN Human Rights Council, and a consolidated report (based on the Turkish and Israeli reports) by a panel set up by the UN Secretary-General (the Palmer-Uribe Report). These four reports all varied in aspects of their analysis and conclusions.

52. Yet the Prosecution also notes the subsequent practice of five domestic prosecuting authorities (outside Israel) with regard to this matter.[78] To the Prosecution's knowledge, all domestic authorities have discontinued their inquiries into the alleged events, in some cases without even considering it necessary or appropriate to open a criminal investigation. No suggestion is made that these authorities have acted other than professionally and in good faith. Thus:

- In 2010, the Turkish authorities opened a criminal investigation into events aboard the *Mavi Marmara*, particularly those affecting the numerous Turkish nationals aboard, and in November 2012 commenced trial proceedings *in absentia* of certain senior IDF members. However, these proceedings were terminated in 2016 at the request of the public prosecutor, in recognition of the bilateral agreement between Israel and Turkey with respect to the *Mavi Marmara* incident,

[76] *See above* para. 12.
[77] First Article 53(3)(a) Request, paras. 48, 51 .*See also above* fn. 72.
[78] On the approach of Israel, *see above* para. 26. The IDF MAG initiated several prosecutions for certain property offences, but declined to open an investigation into the conduct underlying the identified crimes.

which included a payment by Israel of US $20,000,000 into a compensation fund for victims.

- In June 2010, the German authorities likewise received a criminal complaint from certain German nationals aboard the *Mavi Marmara* regarding the events that had occurred. However, based on a preliminary examination (which was made publicly available), the federal prosecutor declined in September 2014 to open a criminal investigation, because there was no sufficient reason to believe that a crime was committed to the detriment of German nationals and, in respect of other nationals, on the basis of the federal prosecutor's discretion.[79]

- In July 2010, at the request of certain Spanish nationals aboard the *Mavi Marmara*, the Spanish authorities opened an investigation into the alleged events. In June 2015, the investigation was closed in conformity with the amendments to Spain's laws on universal jurisdiction. While it is reported that a Spanish magistrate sought to register senior Israeli officials as persons of interest in this investigation, this order was quashed and made ineffective once the investigation was closed.

- In 2014, the Swedish authorities received criminal complaints from certain Swedish nationals aboard the *Mavi Marmara* regarding the events that had occurred. However, in December 2014, the Swedish Prosecution Authority closed its preliminary investigation on the basis that, while "some facts […] may constitute offences, […] the perpetrators are unknown and we are unable to determine their identity".[80]

[79] *See further* 'Complaint regarding the Israeli actions against the Maritime Flotilla for the Gaza Strip (Gaza Flotilla Incident Case) (Case No. 3 ARP 77/10-4), Decision not to instigate investigation, Germany, Federal Prosecutor, 29. Sept 2014,' 181 *International Law Reports* 488; C. Kreß, 'The law of naval warfare and international criminal law: Germany's Federal Prosecutor on the *Gaza Flotilla* Incident,' [2019] 49 *Israel Yearbook on Human Rights* 1, p. 3.
[80] 'Sweden can't sue Israel over ship to Gaza raids,' *The Local.SE*, 10 December 2014.

- According to the Comoros in 2019, the United Kingdom authorities have also been requested to take some form of action in recent months, but declined to do so.[81]

53. The principle of complementarity empowers the Court to act when States with jurisdiction are unable or unwilling genuinely to investigate or prosecute. Yet this does not mean that the Court must *necessarily* act in all circumstances when such States have apparently made a *genuine* determination that investigation is not justified.[82] To the contrary, while such circumstances may mean that a potential case is admissible within the framework of the complementarity analysis, they may nonetheless raise the need for prosecutorial caution—on a case-by-case basis—to ensure that the potential case is also admissible within the framework of the gravity analysis. Potential cases which have been the subject of genuine preliminary assessment by national authorities, but which have not been considered appropriate to refer for further investigation or prosecution, may *potentially* be an indication of insufficient gravity, subject to the Prosecutor's independent assessment under articles 42(1) and 53(1)(b) of the Statute.

54. The Prosecution also notes the submission of the Comoros that it does not consider itself to be in a realistic position to conduct its own national investigation or prosecution, yet supports such proceedings at this Court. However, this circumstance does not weigh significantly in the analysis under article 53(1).[83] In particular, the Prosecution submits that the decision of a State Party to refer a matter to the Court does not affect the standards under article 53(1) of the Statute, and is not a factor which must itself be weighed in the assessment which is undertaken. The Prosecution also notes that, in suitable circumstances, a willing State Party may be

[81] *See* Appeals Chamber Transcript, p. 109:13-15.
[82] *Cf.* Statute, art. 17(1)(b).
[83] *Contra* Appeals Chamber Transcript, p. 121:4-7.

able to benefit from the assistance of various national, regional, or international stakeholders in efforts to provide an appropriate national remedy for victims.

V. The manner of commission of the identified crimes (whether the crimes were committed according to a plan or policy)

55. In the First Article 53(3)(a) Request, the majority concluded that the Article 53(1) Report's assessment of the manner of commission of the identified crimes—and specifically whether there was a reasonable basis to believe they were committed according to a plan or a policy—was "affected" by three errors of fact, such that this conclusion was "unsustainable".[84] The three identified errors related to:

- the timing of the use of live fire with allegedly lethal intent;
- the treatment of passengers detained on the *Mavi Marmara* once they were transferred onto Israeli territory; and
- the weighing of factors which the majority considered to be relevant but which are equally consistent with the existence or non-existence of a plan or policy.

56. Each of these issues is addressed in the following paragraphs. Generally, the majority of the Pre-Trial Chamber (in 2015) understood the Article 53(1) Report to consider that, "if the identified crimes were committed pursuant to some form of plan, conceived at middle of higher levels of IDF command, then these crimes would involve a potential case sufficiently grave under article 17(1)(d) of the Statute and, in principle, warrant investigation."[85] The Prosecution, however, has said that the finding of a plan or policy would be "relevant to, although still not necessarily

[84] First Article 53(3)(a) Request, paras. 44-45.
[85] First Article 53(3)(a) Request, para. 31.

dispositive of, its analysis of the gravity" of the potential case(s) arising from this situation.[86]

V. A. Timing of the use of live fire

57. In the First Article 53(3)(a) Request, the majority emphasised that the Article 53(1) Report refers to the allegation of pre-boarding live fire in the jurisdictional analysis, but made no "reference to the issue […] in considering the manner of commission of the identified crimes."[87] This was in the context of the statement in the Article 53(1) Report that:

> Overall, the information available makes it difficult to establish the exact chain of events in light of the significantly conflicting accounts of when live ammunition was first used and from where it emanated.[88]

58. To any extent the Prosecution in the Article 53(1) Report "had indeed set aside the issue of live fire prior to the boarding on the grounds that the 'significantly conflicting accounts' make it 'difficult to establish the exact chain of events'", the majority in the First Article 53(3)(a) Request considered that this would have been erroneous.[89]

59. The majority stated that "the Prosecutor should have accepted that live fire may have been used prior to the boarding" and that this is "extremely serious and particularly relevant".[90] It considered that "there is no indication that the witness statements, the UN Human Rights Council report, [and] the autopsy reports are manifestly false".[91]

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[86] Prosecutor's Final Decision (Original Version), para. 101.
[87] First Article 53(3)(a) Request, para. 33.
[88] Article 53(1) Report, para. 41. *See also* Prosecutor's Final Decision (Original Version), para. 102.
[89] First Article 53(3)(a) Request, para. 35.
[90] First Article 53(3)(a) Request, para. 36. The majority apparently reached this view on the basis of the written submissions of the Comoros: *see* Prosecutor's Final Decision (Original Version), para. 68.
[91] First Article 53(3)(a) Request, para. 35.

60. The Prosecution has been directed by the Appeals Chamber to apply in this situation the legal interpretations of the majority in the First Article 53(3)(a) Request,[92] which it understands to include the principles that:

- "Facts which are difficult to establish, or which are unclear, or the existence of conflicting accounts, are not valid reasons not to start an investigation but rather call for the opening of such an investigation."[93]

- "[I]t is inconsistent with the wording of article 53(1) of the Statute and with the object and purpose of the Prosecutor's assessment under this provision for her to disregard available information other than when that information is manifestly false."[94]

61. Applying these principles to the available information, the Prosecution acknowledges that at least some of the witness accounts in its possession perceived (what they believed to be) live fire from boats or helicopters in the period of approximately three minutes before the IDF attempted for the second time to board the *Mavi Marmara*.[95] It has also previously identified one incident in which a passenger (Ugur Suleyman SOYLEMEZ) may have been fatally wounded by such a round at such a time.[96] The Prosecution did not disregard or set aside any of this information, to the extent it suggested the possibility of live fire on an isolated and exceptional basis, but gave it a limited degree of weight in this context.[97]

62. In this regard, the Prosecution has explained in detail the basis for its concern that witness accounts alleging the more than isolated and exceptional use of live fire

[92] *See above* para. 11.
[93] First Article 53(3)(a) Request, para. 13. *See also above* para. 14.
[94] First Article 53(3)(a) Request, para. 35. *See also above* para. 14.
[95] *See* Prosecutor's Final Decision (Original Version), paras. 266-267 (recalling information made available to the Prosecution both prior to 6 November 2014 and thereafter). *See also above* para. 9. On the timing of events, *see* Prosecutor's Final Decision (Original Version), paras. 108-110; ICC-01/13-57-AnxB.
[96] *See* Prosecutor's Final Decision (Original Version), paras. 273-274.
[97] *See* Prosecutor's Final Decision (Original Version), paras. 34 (bullet 1), 104, 264.

before IDF troops had boarded the *Mavi Marmara* may in key respects not be reliable.[98] It has also noted its concern that at least some of these accounts may not be credible.[99] However, while these concerns were such that they formerly precluded the Prosecutor from agreeing that there was a "reasonable basis to believe" allegations of more than isolated and exceptional use of live fire before IDF troops had boarded the *Mavi Marmara*, according to her interpretation of article 53(1), the Prosecutor does not consider these concerns to be sufficient to conclude that these allegations are "manifestly false", as now required for the purpose of this situation.[100]

63. On this basis, the Prosecution therefore revises its position in this respect, 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.

64. In particular, the Prosecution had expressed the view in 2017 that, "[e]ven if it were to be accepted *arguendo* that some IDF soldiers did open fire with live ammunition before the first troops set foot on the upper deck of the *Mavi Marmara* (*i.e.*, the commencement of the second boarding effort), this does not establish a reasonable basis to believe, in the circumstances, that the identified crimes were committed according to a plan or policy."[101]

65. There are, as well, other considerations suggested by the available information which would appear to be *inconsistent* with the existence of a plan or policy to

[98] *See* Prosecutor's Final Decision (Original Version), paras. 34 (bullet 2), 104, 106-123; ICC-01/13-57-AnxC. *See also* paras. 267-269, 277.
[99] *See* Prosecutor's Final Decision (Original Version), paras. 179-186; ICC-01/13-57-AnxG.
[100] While the Prosecution would not concur with the notion that it had at any stage of these proceedings "disregarded" any of the information made available, it understands (out of a further abundance of caution) the majority of the Pre-Trial Chamber to have meant by this term that the Prosecution must *accept and give some weight to* all information which is not manifestly false. *See above* fn. 94; and *further above* paras. 11-14.
[101] Prosecutor's Final Decision (Original Version), para. 124. *See also* paras. 103, 123, 275.

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 possible exception,[102] 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.[103]

- The IDF appears to have acted reasonably in initially seeking to board the *Mavi Marmara* by surprise.[104] Only when this 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 IDF troops setting foot on the deck.[105]

- 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.[106] In particular, it does not seem to have employed lethal force from the outset, as such a tactic

[102] *See above* fn. 96.
[103] *See* Prosecutor's Final Decision (Original Version), para. 93. *See also* paras. 90-92. The Prosecution recalls that, for the purpose of the Article 53(1) Report, it has not taken into account questions of individual responsibility for the identified incidents, including the possibility of self-defence. On the degree of resistance, which lasted for a period of up to 47 minutes, *see e.g.* Prosecutor's Final Decision (Original Version), para. 90 (fn. 158); Article 53(1) Report, paras. 40-42, 51 (noting that IDF troops were resisted by a large group of passengers who attacked the IDF boarders with, among other items, fists, wooden clubs, iron rods, chains, slingshots (with metal and glass balls), and knives, and that three of the IDF soldiers who initially boarded the *Mavi Marmara* were "attacked and overpowered by a group of passengers and taken to the hold of the ship", and that "overall nine IDF soldiers were seriously wounded by passengers"). The Prosecution finds no basis in the available information to consider that crimes within the jurisdiction of the Court, other than the identified incidents of outrages upon personal dignity, were committed after resistance had ceased on the *Mavi Marmara*: *see* Prosecutor's Final Decision (Original Version), paras. 279-282, 287-291.
[104] *See also* Prosecutor's Final Decision (Original Version), paras. 243-246, 304-317, 326 (noting that on the information available no adverse inferences can be drawn, in the circumstances, from the IDF's decision to board the *Mavi Marmara*).
[105] *See above* para. 61.
[106] *See* Prosecutor's Final Decision (Original Version), paras. 100 (fn. 176), 108-109, 112, 114, 119, 125.

would likely have prevented the initial members of the boarding party being overpowered by the passengers, as in fact occurred.[107]

- 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.[108]

66. The Prosecution may not be bound by the *conclusion* of the majority of the Pre-Trial Chamber (in 2015) that the finding that "live fire may have been used prior to the boarding of the *Mavi Marmara*" may "reasonably suggest that there was, on the part of the IDF forces who carried out the identified crimes, a prior intention to attack and possibly kill passengers on board the *Mavi Marmara.*"[109]

67. Nevertheless, accepting for the purpose of this situation that "unclear" or "conflicting accounts" must be considered to "call for the opening of […] an investigation",[110] then the Prosecution accepts that the identified crimes *may* have been carried out pursuant to a plan or policy, insofar as the Prosecution has identified considerations which would both support and contradict such a conclusion.

68. Accordingly, the possibility that the identified crimes were committed according to a plan or policy is taken into account by the Prosecutor in considering the weight to be given to this factor (manner of commission of the identified crimes) in assessing the gravity of the potential case(s) arising from this situation.[111]

69. Nothing in the available information suggests that *all* the IDF troops who took part in the boarding were involved in any plan or policy to commit the identified

[107] *See* Prosecutor's Final Decision (Original Version), paras. 270-271. *See also* para. 126.
[108] *See* Prosecutor's Final Decision (Original Version), paras. 289-290.
[109] First Article 53(3)(a) Request, para. 36. *See further above* paras. 12-13.
[110] *See above* paras. 14, 60.
[111] *See below* paras. 89-96.

crimes, nor that such a plan or policy was necessarily known to or shared by IDF troops other than those that 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.

70. The Prosecution's acceptance of the possible existence of a plan or policy, in light of the direction of the Appeals Chamber, does not mean that it necessarily accepts *all* the other factual assertions which have been made by the Comoros, or its characterisations of the Prosecution's own previous analysis.[112] This point is made simply to ensure that the Prosecution's own appreciation of the situation is as clear as possible. Thus, for example, the Prosecution notes that:

- while representatives of the Comoros recently ascribed prominence to the reliability of the account of one witness, they apparently overlooked that this person was not a passenger aboard the *Mavi Marmara* at all, but aboard another vessel in the flotilla;[113]

- the accounts of witnesses V115 and V268 were neither "trivial[ised]" nor ignored by the Prosecution at any point, but instead were carefully considered;[114]

[112] *See e.g.* Appeals Chamber Transcript, p. 49:3-7. In particular, for example, the Prosecution respectfully emphasises its view that it is simply not correct to suggest that the Comoros has "essentially produced a ready-made private prosecution": *contra* Appeals Chamber Transcript, p. 110:14-15.
[113] *See* Appeals Chamber Transcript, p. 81:7-13. This witness is V312, who described herself as being some "100 yards" off the port stern of the *Mavi Marmara*. The Prosecution never overlooked this information and indeed acknowledged this witness' account: *see e.g.* Prosecutor's Final Decision (Original Version), paras. 264 (fn. 434), 267 (fn. 442). Full statements of this witness were only made available to the Prosecution in 2016. *See above* para. 9.
[114] *Contra* Appeals Chamber Transcript, pp. 95:10-25 (referring to V115), 145:6-25 (referring to V268). For example, the Prosecution has expressly considered and taken into account the information provided by V115 but assessed that it can only be given "very little weight": *see* Prosecutor's Final Decision (Original Version), paras. 122 (fourth bullet point), 182 (fn. 314), 267 (fn. 442), 268 (fn. 444); ICC-01/13-57-AnxC ("Prosecutor's Final Decision (Original Version), Annex C"), paras. 43-45. Likewise, the Prosecution has expressly considered and taken into account the information provided by V268, who was shot "while fighting [the] soldiers": *see* Prosecutor's Final Decision (Original Version), paras. 122 (first, third, and seventh bullet points), 182 (fn. 316), 193 (fn. 336), 234 (fns. 411, 413), 249 (third bullet point), 267 (fn. 442), 288, 289 (fn. 472); Prosecutor's Final Decision (Original Version), Annex C, paras. 31-37.

- while the Prosecution has indeed consistently maintained that there is a reasonable basis to believe ten persons were wilfully killed—and expressly identified the possibility that three of these persons sustained injuries when they were no longer standing on their feet,[115] it has found no information to suggest that this occurred after resistance on the *Mavi Marmara* had ceased.[116] While representatives of the Comoros may have sought to describe only these events,[117] the Prosecution nonetheless observes that it has never been provided with, nor has it otherwise ever had in its possession, any "video footage which […] appears [to show] soldiers executing people, people trying to crawl away, soldiers following them and shooting them."[118]

V. B. Alleged events subsequently occurring on Israeli territory

71. In the First Article 53(3)(a) Request, the majority expressed the view that it was "unreasonable" for the Prosecution to have considered that "systematic abuse of detained passengers from the *Mavi Marmara*" on Israeli territory, after the ship had been brought into Ashdod, "fits into the theory that the identified crimes occurred as individual excesses of IDF soldiers who boarded the *Mavi Marmara*".[119] Rather, the majority considered that "such systematic abuse reasonably suggests a certain degree of sanctioning of the unlawful conduct on the *Mavi Marmara*, at least in the form of tacit acquiescence of the military or other superiors."[120]

72. The alleged conduct in question is characterised by:

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[115] *See* ICC-01/13-57-Conf-AnxD, paras. 25, 27, 61-64, 67, 127.
[116] *See* Prosecutor's Final Decision (Original Version), paras. 197-199.
[117] *See* Appeals Chamber Transcript, p. 81:20-21 (suggesting that IDF soldiers were "standing over passengers and executing them").
[118] *Contra* Appeals Chamber Transcript, p. 82:2-4. While the Prosecution does have certain video footage in its possession, and is aware of one particular passage which appears directly to show a criminal act occurring, it is unaware of any footage matching this description. The Prosecution also notes that much of the footage available appears to reflect a compilation of several different pieces of original footage, edited together, and should be treated with caution.
[119] First Article 53(3)(a) Request, para. 38.
[120] First Article 53(3)(a) Request, para. 38.

- A coercive atmosphere when the passengers from the *Mavi Marmara* were initially received and processed at Ashdod, including allegations of searches which were carried out roughly or perceived as humiliating or degrading, insults or mockery, and being pushed around or assaulted.[121]

- Allegations of poor conditions in the detention facility where passengers were held awaiting deportation from Israel, including noise at night and disrupted sleep, poor standards of food and drink, difficulty in contacting family members, insufficient privacy, insults or mockery, and being pushed around or assaulted.[122]

- Allegations of physical confrontations and assault of some passengers at Ben-Gurion airport, prior to being deported, including at least one incident also described by the Israeli authorities as a "riot" in which "about 40 flotilla participants […] began to clash with police forces in the passenger hall".[123]

73. The Prosecution notes that the majority's view (in 2015) of the significance of these allegations turned on its assumption that they were indeed systematic in nature—which it considered that the Prosecution had "recognise[d], but merely finds 'concerning'".[124] Yet the Prosecution made no such acknowledgement, but only remarked in the course of litigation that any "information suggesting further mistreatment of some detainees once they arrived in Israeli territory is concerning".[125] Indeed, at the time of the First Article 53(3)(a) Request, the

[121] *See* Prosecutor's Final Decision (Original Version), para. 207. It should be noted, however, that this summary includes information made available after 6 November 2014. *See further above* para. 9. The Prosecution also notes that it has not drawn any conclusions about the legality or not of this conduct, in whole or in part: *see* Prosecutor's Final Decision (Original Version), paras. 208-211.
[122] *See* Prosecutor's Final Decision (Original Version), para. 216. It should be noted, however, that this summary includes information made available after 6 November 2014. *See further above* para. 9. The Prosecution also notes that it has not drawn any conclusions about the legality of this conduct, in whole or in part: *see* Prosecutor's Final Decision (Original Version), paras. 217-222.
[123] *See* Prosecutor's Final Decision (Original Version), paras. 226-228. It should be noted, however, that this summary includes information made available after 6 November 2014. *See further above* para. 9. The Prosecution also notes that it has not drawn any conclusions about the legality of this conduct, in whole or in part: *see* Prosecutor's Final Decision (Original Version), paras. 229-231.
[124] First Article 53(3)(a) Request, para. 38.
[125] First Article 53(3)(a) Request, para. 37 (quoting the Prosecution).

Prosecution had drawn no legal conclusions as to the nature of the conduct occurring on Israeli territory, which was beyond the jurisdiction of the Court, and which—on its apparent facts—did not appear to be sufficiently related to the identified crimes aboard the *Mavi Marmara* (due to the absence of an adequate nexus between the perpetrators of the alleged conduct).

74. After the First Article 53(3)(a) Request was issued, the Prosecution further clarified its position in 2017 by stating that "there does not appear to be a reasonable basis to believe that any abuse of the *Mavi Marmara* passengers on Israeli territory was itself *systematic*, nor that any such conduct was relevantly associated with the identified crimes aboard the *Mavi Marmara*."[126]

75. Specifically, given the information available, the Prosecution could not discern any basis for the view that "'military or other superiors' acquiesced in the alleged abuse on Israeli territory"—a question about which there is "simply no information", especially with regard to those superiors' alleged awareness at the material times of any conduct on Israeli territory which might have been unlawful.

76. Nor could the Prosecution identify any information suggesting that "those [superiors] were the same persons responsible for the IDF troops which undertook the boarding operation" on the *Mavi Marmara*.[127] In particular, "the alleged conduct on Israeli territory was attributed not only to IDF members (and thus, persons at least within the same organisation as those who carried out the boarding of the *Mavi Marmara*) but also to 'immigration officers' and 'police'". Nor did it "occur only at military installations but also civil facilities including Ben Gurion airport and domestic prisons".[128]

77. On this basis, the Prosecution concluded:

[126] Prosecutor's Final Decision (Original Version), para. 144. *See also* para. 145.
[127] Prosecutor's Final Decision (Original Version), para. 144. *See also* para. 145.
[128] Prosecutor's Final Decision (Original Version), para. 140.

> While there is a continuum between the victims of the alleged conduct, the link between the groups of alleged perpetrators is tenuous—they are united only by their nationality, their service to the Israeli government, and the allegations that some persons in these groups mistreated detainees. The conduct of such unrelated groups has very little or no probative value in showing a reasonable basis to believe that there was a plan or policy to commit crimes aboard the *Mavi Marmara*.[129]

78. In reconsidering these allegations, the Prosecution is mindful of the guidance recently provided by the Appeals Chamber.[130]

79. First, concerning the binding effect (for the purpose of this situation) of the legal analysis in the First Article 53(3)(a) Request, the Prosecution notes that it has not sought to apply the article 53(1) standard of proof to determine whether the alleged mistreatment on Israeli territory occurred or not. Rather, it has highlighted the absence of *any* information which rationally and adequately links the alleged events on Israeli territory to the identified crimes aboard the *Mavi Marmara*. Accordingly, the legal interpretations in the First Article 53(3)(a) Request, relating to the standard of proof under article 53(1), do not pertain to this question.

80. The First Article 53(3)(a) Request did confirm that the Court is "not preclude[d] […] from considering facts that in themselves occur outside of its jurisdiction for the purpose of determining a matter within its jurisdiction"[131]—with which the Prosecution agrees. However, the majority did not rule on the further question which is apposite, which is the *proximity* of the nexus required to determine that extra-jurisdictional conduct is *relevant* to a matter within the Court's jurisdiction. In the Prosecution's view, the nexus is not sufficiently established on the present facts, for all the reasons previously described. Since this matter has not been addressed by

[129] Prosecutor's Final Decision (Original Version), para. 141.
[130] *See above* paras. 11-14.
[131] First Article 53(3)(a) Request, para. 17. *See also above* para. 14.

the First Article 53(3)(a) Request, the Prosecution understands that it is permitted to maintain this view.

81. Second, the majority in the First Article 53(3)(a) Request appears to have sought to direct the Prosecutor to draw particular *factual* conclusions—that the alleged conduct on Israeli territory was systematic; that the perpetrators of the identified crimes on the *Mavi Marmara* and perpetrators of the alleged conduct on Israeli territory were the same or had certain superiors in common, and these superiors knowingly acquiesced in illegal conduct by their subordinates; and that there was for these reasons a sufficient nexus between the alleged conduct on Israeli territory and the identified crimes on the *Mavi Marmara*, such that the alleged conduct on Israeli territory was a relevant consideration in determining whether the identified crimes on the *Mavi Marmara* were committed according to a plan or policy. However, the Prosecution understands from the Appeals Chamber's judgment that it is not obliged to accept these factual conclusions.[132] Based on its own analysis, the Prosecution does not find that these conclusions follow from the information made available, even applying the legal interpretations in the First Article 53(3)(a) Request.

82. Third, even if the Prosecution must take account of the alleged conduct on Israeli territory in considering whether the identified crimes aboard the *Mavi Marmara* were committed according to a plan or policy, it could still only give this consideration limited weight given the absence of information linking the alleged perpetrators of the alleged conduct on Israeli territory and the alleged perpetrators of the identified crimes.

V. C. Other factors considered by the Pre-Trial Chamber to be relevant

83. In the First Article 53(3)(a) Request, the majority also identified three factors which it considered to be relevant in determining whether the identified crimes were

[132] *See above* paras. 12-13.

committed according to a plan or policy. These concerned: the degree of force used in taking control of the *Mavi Marmara*; the alleged conduct by some IDF soldiers to destroy CCTV equipment and thus potentially to have sought to conceal the identified crimes; and the unique occurrence of crimes aboard the *Mavi Marmara*. In the view of the majority, the Article 53(1) Report erred "in not recognising one of the reasonable alternative explanations of the available information" in these three respects, which was consistent with such a plan or policy.[133]

84. The Prosecution agrees that it is appropriate to take account of all relevant circumstances which are "compatible" with a fact in issue.[134] Nor is there any dispute concerning the material facts relevant to these three factors.

85. However, the Prosecution has already revised the conclusion to which these factors are said to be relevant, accepting the possibility that the identified crimes were committed according to a plan or policy among some but not necessarily all of the IDF troops who carried out the boarding.[135] Nothing in these additional factors adds significantly to this conclusion. They neither suggest that the plan or policy is of any wider scope than otherwise might be inferred, nor do they require greater weight to be given to the conclusion concerning the possible existence of a plan or policy, whether assessed individually or cumulatively.

V.C.1. Degree of force used in taking control of the *Mavi Marmara*

86. In the First Article 53(3)(a) Request, the majority stated that "the Prosecutor did not ignore the apparent brutality of the commission of the crimes",[136] quoting a passage of the Article 53(1) Report in which the Prosecution had observed that "the means and extent of force used by the IDF forces against the passengers on board the

[133] First Article 53(3)(a) Request, para. 41.
[134] First Article 53(3)(a) Request, para. 41.
[135] *See above* paras. 68-69.
[136] First Article 53(3)(a) Request, para. 40.

vessel appears to have been excessive in a number of instances".[137] The Prosecution notes that its observation was informed, at least in part, by the fact that crimes had been identified at all—by definition, incidents of wilful killing, the wilful causing of serious injury, and outrages upon personal dignity will always constitute the apparently "excessive" use of force.[138] As such, even if it is necessary to take this factor into account in considering the existence of a plan or policy, it can only be to a limited extent—otherwise, it seems tantamount to saying that the existence of a crime by itself establishes that the crime was committed according to a plan or policy.

V.C.2. Alleged conduct to conceal the identified crimes

87. In the First Article 53(3)(a) Request, the majority appears to have drawn the factual conclusion that "the IDF forces who carried out the identified crimes attempted to conceal the crimes."[139] This was based on information suggesting that the IDF sought to confiscate electronic media from the passengers on the *Mavi Marmara*, and to have interfered with the vessel's closed circuit television ("CCTV") system.[140] This information was relevant in considering the existence of a plan or policy. However, it was equally consistent with efforts to cover up planned or spontaneous criminal acts, and this is relevant to the weight assigned to it.[141]

V.C.3. Unique occurrence of the identified crimes aboard the *Mavi Marmara*

88. In the First Article 53(3)(a) Request, the majority expressed the view that the "unique" nature of the events aboard the *Mavi Marmara* could be explained by the facts that "it carried at least 546 activists, *i.e.*, approximately 80% of the people of the entire flotilla, including 'activists' linked to the Hamas according to some accounts

[137] Article 53(1) Report, para. 140.
[138] *But see above* fn. 103 (recalling that, for the purpose of this preliminary examination, the Prosecution has not entered into questions of individual responsibility, such as self-defence).
[139] First Article 53(3)(a) Request, para. 41.
[140] *See e.g.* Prosecutor's Final Decision (Original Version), paras. 148-149, 321.
[141] *See also* Prosecutor's Final Decision (Original Version), para. 153 (noting that this fact *in itself* was "not considered sufficient—in the context of the other available information—to establish a reasonable basis to believe that such a plan or policy existed").

[…], and did not carry humanitarian supplies".[142] While this is true, this fact must of course be taken into consideration together with the associated fact that the *Mavi Marmara* was the only ship in which violent measures to resist the IDF boarding were effectively mounted.[143] This information was relevant in considering the existence of a plan or policy. However, again, it was equally consistent with the spontaneous occurrence of the identified crimes in response to the resistance of the passengers, and this is relevant to the weight assigned to it.

VI. Allocation of weight to identified factors and overall assessment of gravity

89. Consistent with the preceding paragraphs, applying the legal interpretations adopted by the majority of the Pre-Trial Chamber in the First Article 53(3)(a) Request, the Prosecution takes into account, for the limited purpose of its gravity analysis under articles 53(1)(b) and 53(3)(a) and rule 108(3), that:

- the likely objects of any investigation would include the perpetrators of wilful killing and the wilful causing of serious injury, although these may be difficult to identify, and the perpetrators of outrages upon personal dignity as well potentially as accessories and the immediate superiors of these persons aboard the *Mavi Marmara*;

- the scale of the identified crimes is to be assessed with reference to the facts that: 10 persons are alleged to have been wilfully killed, but not necessarily by the same perpetrator(s); as many as 55 persons are alleged to have been wilfully injured, but not necessarily by the same perpetrator(s); and 'many' persons

[142] First Article 53(3)(a) Request, para. 43. The majority also stated that "there is indication that some force was used against the persons also aboard the other vessels", but clearly distinguished the "unique" nature of the events aboard the *Mavi Marmara*. While the Comoros has previously maintained that crimes were also committed aboard other vessels, where there was no similar degree of resistance by the passengers, this seems to be based upon the analysis of the UN Human Rights Council, which in turn was based on the view that the interception of the flotilla was unlawful as a whole: *see* Prosecutor's Final Decision (Original Version), para. 156.
[143] *See above* fn. 103.

aboard the *Mavi Marmara* are alleged to have been subject to outrages upon personal dignity during the voyage to Ashdod;

- the factual nature of the identified crimes is to be assessed with reference to the facts that:

    - the persons alleged to have been wilfully killed and wilfully injured were victimised in circumstances that were at least proximate to the passengers' violent resistance to the boarding of the *Mavi Marmara* by the IDF, and that while at least some victims appear to have been *hors de combat* when they were further injured, any investigation will need to determine for each victim their status and activities at the material times, and also to consider questions of the responsibility of alleged perpetrators, including potentially self-defence;

    - the persons alleged to have been subject to outrages upon personal dignity were, generally speaking, not each subject to *all* the forms of treatment which—for the purpose of this preliminary examination—has been treated as potentially rising to the threshold of outrages upon personal dignity, and this conduct occurred in the context of a relatively brief temporal period (the remaining voyage to Ashdod) and in the relatively exigent circumstances applying to the *Mavi Marmara* at that time;

- the impact of the identified crimes is to be assessed with reference to the facts that: 10 persons are alleged to have been directly victimised as a result of wilfully killing, and bystanders or relatives of these persons indirectly victimised; as many as 55 persons are alleged to have been directly victimised as a result of wilful injury, and bystanders or relatives of these persons indirectly victimised; and many persons aboard the *Mavi Marmara* are alleged to have been directly

victimised as a result of outrages upon personal dignity, and bystanders or relatives of these persons potentially indirectly victimised;

- the manner of commission of the crimes is to be assessed with reference to the facts that:

    - some members of the IDF who boarded the *Mavi Marmara* may have been implicated in a plan or policy to commit the identified crimes, and in this respect live rounds may have been fired on a more than isolated and exceptional basis in the brief period after the first boarding attempt but prior to the first IDF troops arriving on the deck of the *Mavi Marmara*;

    - nothing in the information available suggests that medium or high-level IDF members not participating in the boarding operation were implicated in any plan or policy to commit the identified crimes;

    - notwithstanding any plan or policy to commit the identified crimes among some members of the IDF boarding party, members of the IDF boarding the *Mavi Marmara* also appeared to employ tactics which were inconsistent with a plan or policy to commit one or more of the identified crimes, including the use of 'less-lethal' weapons and a graduated use of force in apparent response to the escalating degree of resistance by the passengers. After a hiatus, the IDF also appeared to make reasonable efforts to provide medical care to the wounded, in compliance with its legal obligations.

90. The Prosecution recalls the Appeals Chamber's recent guidance that the Prosecutor enjoys a margin of appreciation, for the purpose of article 53(1)(b), when evaluating and balancing the numerous relevant factors and information in order to determine whether there is at least one potential case in the situation which is of

sufficient gravity.[144] Consequently, the assessment of gravity is fact-sensitive, and based on a unique appreciation of the various factors in play and the balance between them. As such, analogies between cases or potential cases will rarely be helpful or instructive.[145]

91. The Prosecutor specifically recalls, and is sensitive to, the view clearly expressed by the victims in this situation that there is indeed at least one potential case of sufficient gravity. She also notes the different views expressed by members of the Pre-Trial Chamber in 2015. Nevertheless, after careful consideration, and mindful of the relevant facts identified herein, the Prosecutor maintains her view that no potential case in this situation is sufficiently grave so as to be admissible before the Court.

92. In this regard, and in the context of a cumulative assessment of all relevant considerations, the Prosecutor has given particular weight to the fact that the scale of victimisation in this situation (number of victims, and impact upon the victims) remains relatively limited, and the absence of countervailing factors which may in part offset this consideration.[146]

93. This assessment is further informed by the very limited prospect, in the professional experience of the Prosecutor,[147] that the totality of the victimisation which has been identified could, even if proved, be prosecuted in a single case.

[144] *See above* para. 12.
[145] *See also* ICC-01/05-01/13-2351 A10, para. 65 (noting, in the context of sentencing—which, to a large extent, also reflects an assessment of the gravity of particular conduct—that it is "unhelpful" to make general comparisons between different cases).
[146] While the identification of such countervailing factors falls within the margin of appreciation afforded to the Prosecutor, at least for the purpose of article 53(1)(b) of the Statute, these may include, if established to a sufficient degree by the available information or evidence: discriminatory victimisation; the special status of the victims or objects, as recognised under international law (such as peacekeepers or humanitarian assistance workers or cultural property inscribed on the World Heritage List), in combination with information showing the resulting enhanced consequences of the victimisation; 'public spectacle' criminality (in which simultaneous or subsequent dissemination of the criminal act by audio-visual media is shown to be an integral part of the alleged conduct); and 'production line' criminality (in which the criminality is shown to form part of a well established and systematic course of conduct, such as the running of a detention centre, etc).
[147] *See* Statute, art. 42(3).

Rather, even within the context of the relatively limited scope of this situation, it is likely that the identified crimes could only be pursued within a series of prosecutions of even more confined scope, in which considerations of sufficient gravity—which pertain to cases—might be even more acute. It is also recalled in this context that, even within the framework of judicial systems which are designed for large volumes of cases with relatively limited scope, no national prosecuting authority has considered it appropriate to proceed with respect to the identified crimes.

94. The Prosecutor has given very careful consideration to the significance of the plan or policy to commit the identified crimes, which may have existed among some members of the IDF. Very often, and consistent with article 8(1) of the Statute, the existence of such a plan or policy may militate in favour of finding that a case or potential case is of sufficient gravity. However, in the particular circumstances of this situation, and giving weight to the factual nature of the identified crimes and their manner of commission—and the complex interplay in this situation between potentially lawful conduct and allegedly unlawful conduct—the Prosecutor is satisfied that even the commission of the identified crimes according to a plan or policy among some members of the IDF, not apparently including personnel at medium or high levels of IDF command who were not participants in the boarding operation, should receive relatively low weight in the circumstances of this situation.

95. Finally, the Prosecutor approaches the assessment of gravity while mindful of the selective mandate of this Court. The criteria set out in article 53(1)—which define whether there exists a reasonable basis to proceed with an investigation—underline that this Court cannot, and should not, seek to address every criminal allegation brought to its attention. Impartial, diligent application of these criteria is essential to prevent the Court from collapsing under the weight of matters brought before it. It is for this reason that the Prosecutor's competence in carrying out preliminary

examinations is necessarily linked with the Prosecutor's competence in carrying out investigations. This may well justify the margin of appreciation afforded to the Prosecutor under article 53(1)(b), which was identified by the Appeals Chamber.

96. As in this situation, the selective mandate of the Court may undoubtedly lead to difficult assessments, and these may cause understandable concern for the individuals affected. But it should not necessarily cause unfairness. Since the Court is conceived as one part of the wider system of international justice under the Rome Statute—which is the logic of the principle of complementarity—then States must also share the burden in investigating and prosecuting cases, as need be, which are not sufficiently grave for action before the Court itself. The Prosecutor will continue to advocate for States to meet that burden, even as she will continue to carry out her own duties of investigation and prosecution for those situations which do fall within the selective mandate of the Court.

Conclusion

97. For all the preceding reasons, consistent with articles 53(1)(b) and 53(3)(a) of the Statute and rule 108(3), and based on the information available on 6 November 2014, and the legal interpretations contained in the First Article 53(3)(a) Request, the Prosecutor hereby maintains her view that the preliminary examination of this situation must be closed. There remains no reasonable basis to proceed with an investigation, since there is no reasonable basis to conclude that any potential case arising from the situation would be of sufficient gravity to be admissible before the Court.