Cour
Pénale
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International
Criminal
Court

Original: **English**

No.: **ICC-01/13**
Date: **23 June 2015**

PRE-TRIAL CHAMBER I

Before: **Judge Joyce Aluoch, Presiding Judge**
Judge Cuno Tarfusser
Judge Péter Kovács

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

Public Redacted Version of ICC-01/13-27-Conf

Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation

Source: **Office of Public Counsel for Victims**

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

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I. PROCEDURAL BACKGROUND

1. On 14 May 2013, the authorities of the Union of the Comoros (the "Comoros") referred to the Prosecutor the situation relating to the incidents allegedly committed from 31 May 2010 through 5 June 2010 on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia bound for the Gaza Strip (the "Referral" and the "Situation", respectively).[1]

2. On 19 May 2014, the Comoros provided the Prosecutor with supplemental submissions to the Referral (the "Supplemental Submissions").[2]

3. On 6 November 2014, the Prosecutor issued a report in which she concluded that there is "[a] *reasonable basis to believe that war crimes under the Court's jurisdiction have been committed in the context of interception and takeover of the* Mavi Marmara *by IDF soldiers on 31 May 2010*", but considering that "[t]*he potential case(s) that would likely arise from an investigation into the situation would not be of sufficient gravity to justify further action by the Court and would therefore be inadmissible pursuant to articles 17(1)(d) and 53(1)(b) of the Statute*", she decided that "[t]*here is no reasonable basis to proceed with an investigation and* […] *decided to close this preliminary examination*" (the "Prosecutor's Decision" or the "Decision").[3]

4. On 29 January 2015, the Comoros requested Pre-Trial Chamber I (the "Chamber") to review the Prosecutor's Decision and to direct the Prosecutor to

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

[2] See the "Annex 2 to: Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation", No. ICC-01/13-3-Conf-Anx2, 19 May 2014 (the "Supplemental Submissions").

[3] See "Situation on Registered Vessels of Comoros, Greece, and Cambodia: Article 53(1) Report", No. ICC-01/13-6-AnxA, 4 February 2015 (dated 6 November 2014), paras. 149-151 (the "Prosecutor's Decision" or the "Decision").

reconsider said Decision under article 53(3)(a) of the Rome Statute (the "Application for Review").[4]

5. On 30 March 2015, the Prosecutor provided its response to the Review Application (the "Prosecution Response").[5]

6. On 24 April 2015, the Chamber issued the "Decision on Victims' Participation", whereby it, *inter alia,* appointed the Principal Counsel of the Office of Public Counsel for Victims (the "Principal Counsel") as legal representative of unrepresented victims for the purposes of the current proceedings under article 53 of the Rome Statute, and invited victims who had communicated with the Court to submit any observations deemed relevant to the Chamber's review of the Prosecutor's Decision by 5 June 2015.[6]

7. On 18 May 2015, the Chamber extended until 22 June 2015 the deadline for the Principal Counsel to submit the observations of the victims she represents in the current proceedings.[7]

8. Pursuant to the Decision on Victims' Participation,[8] the Principal Counsel submits the following observations on behalf of the victims.[9]

9. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, these observations are filed confidentially because they refer to confidential submissions. A public redacted version will be submitted as soon as practicable.

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[4] See the "Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation", No. ICC-01/13-3-Red, 29 January 2015 (the "Application for Review").
[5] See the "Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute", No. ICC-01/13-14-Red, 30 March 2015 (the "Prosecution Response").
[6] See the "Decision on Victims' Participation" (Pre-Trial Chamber I), No. ICC-01/13-18, 24 April 2015, p. 10.
[7] See the "Decision on the 'Request for extension of time to submit Victims' Observations in relation to the article 53 proceedings" (Pre-Trial Chamber I), No. ICC-01/13-23, 19 May 2015.
[8] See the "Decision on Victims' Participation", *supra* note 6, para. 21.
[9] See the "Notification following the appointment of the Office of Public Counsel for Victims as legal representative of unrepresented victims who have communicated with the Court for the purposes of the proceedings under article 53(3)a of the Rome Statute", No. ICC-01/13-26, 28 May 2015.

10. The Principal Counsel contends that the Prosecutor's finding according to which the potential case(s) which might derive from the investigation into the situation would not be of sufficient gravity to justify further action by the Court is incorrect because the Prosecutor, in applying the legal criteria to determine whether an investigation must be opened, misinterpreted the information available to her.

11. The Principal Counsel submits that any assessment of the issue of gravity necessarily stems from the evaluation of all information available to the Prosecutor. Therefore, the present observations address, first, the applicable legal criteria and, subsequently, demonstrate how in applying said legal criteria to the information available to her, the Prosecutor reached an erroneous conclusion in relation to the lack of gravity. Finally, the specific observations by victims consulted for the purposes of these proceedings are provided.

II. OBSERVATIONS ON BEHALF OF VICTIMS

1. On the applicable legal criteria

12. Chambers already clarified that the standard to determine whether an investigation must be opened into a situation is the same under the Rome Statute regardless of whether said investigation is opened by the Prosecutor pursuant to a referral or upon authorisation from a Pre-Trial Chamber. For this purpose, the Rome Statute requires the existence of a "*reasonable basis to proceed*" upon examining whether the criteria under article 53(1)(a)-(c) of the Rome Statute are satisfied.[10]

13. Accordingly, the Principal Counsel refers to the criteria already identified by Chambers in the decisions authorising the Prosecutor to conduct investigations in the situation in Kenya and in the situation in Côte d'Ivoire, regarding (i) the

[10] See the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" (Pre-Trial Chamber II), No. ICC-01/09-19-Corr, 1 April 2010 (the "Kenya Article 15 Decision"), paras. 21, 26, 66 and 68.

jurisdictional analysis required by article 53(1)(a) of the Rome Statute (*i.e.* whether the alleged crimes fall within the material, temporal, and territorial/personal jurisdiction of the Court),[11] (ii) the admissibility assessment of situations conducted pursuant to article 53(1)(b) of the Rome Statute, including its dimensions of gravity (*i.e.* whether the likely set of cases or potential case(s) that would arise from an investigation of the situation concern those who may bear the greatest responsibility for crimes allegedly committed in the context of quantitatively and/or qualitative grave incidents)[12] and complementarity (*i.e.* whether relevant States are conducting or have conducted national proceedings in relation to the groups of persons and the crimes allegedly committed during the incidents which would likely form the object of the Court's investigations),[13] and (iii) the conditional analysis of the interests of justice regarding situations pursuant to article 53(1)(c) of the Rome Statute, only if the Prosecutor decides not to proceed with the investigation on the basis of this sole factor.[14]

14. The Principal Counsel notes the Prosecutor's similar understanding of the applicable legal criteria, as reflected in the Regulations of the Office of the Prosecutor and in the Prosecutor's Decision.[15] It is worth noting that the Prosecutor has adopted "policy papers" on interests of justice and on the conduct of preliminary

[11] See the Kenya Article 15 Decision, *supra* note 10, paras. 39 and 172, 175; and the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire" (Pre-Trial Chamber III), No. ICC-02/11-14, 3 October 2011 (the "Côte d'Ivoire Article 15 Decision"), paras. 22 and 186-187.
[12] See the Kenya Article 15 Decision, *supra* note 10, paras. 45, 48-50, 58-62, 182 and 188-189; and the Côte d'Ivoire Article 15 Decision, *supra* note 11, paras. 190-191 and 202-204.
[13] See the Kenya Article 15 Decision, *supra* note 10, paras. 45, 48-50, 52 and 182; and the Côte d'Ivoire Article 15 Decision, *supra* note 11, paras. 190-191 and 194.
[14] See the Kenya Article 15 Decision, *supra* note 10, para. 63; and the Côte d'Ivoire Article 15 Decision, *supra* note 11, para. 207.
[15] See the Regulations of the Office of the Prosecutor, Doc. ICC-BD/05-01-09, 23 April 2009, regulations 29 and 31, available at http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf; and the Prosecutor's Decision, *supra* note 3, paras. 133-136.

examinations, where the consideration of all or some of these factors is addressed in practical terms.[16]

15. Moreover, the Principal Counsel submits that the Chamber must take into account the following considerations when reviewing the Prosecutor's Decision pursuant to article 53(3)(b) of the Rome Statute.

16. Firstly, the Rome Statute presumes that the Prosecutor will investigate a situation upon a referral from a State Party. Pursuant to the literal wording of article 53(1) of the Rome Statute, the Prosecutor is mandated ("*shall*") to start investigating a referred situation "[u]*nless he or she determines* [having evaluated the information made available to him or her] *that there is no reasonable basis to proceed*". In other words, there is a presumption that the Prosecutor will act upon referrals,[17] her decision not to open the investigation being only justified by her conclusion that the Court has no jurisdiction, that the situation is not admissible and/or that the situation is not grave enough.

17. Accordingly, the Principal Counsel contends that where the Prosecutor considers that there are inconsistencies in the information available to her concerning a particular referral, the latter's decision whether to start an investigation ought to be made on the basis of the available evidence considered, in principle, as being in favour of the State making the referral. The required predisposition for an investigation will be effective in practice only when adopting this approach, even more so because, as already stated by Chambers, the information available at this early stage of the proceedings is "[n]*either expected to be 'comprehensive' nor 'conclusive', if compared to evidence gathered during the investigation*".[18]

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[16] See the "Policy Paper on the Interests of Justice", September 2007, available at http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf; and the "Policy Paper on Preliminary Examinations", November 2013, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf.

[17] See the Referral, *supra* note 1, para. 68.

[18] See the Kenya Article 15 Decision, *supra* note 10, para. 27. See also the Côte d'Ivoire Article 15 Decision, *supra* note 11, para. 24; and the Prosecutor's Decision, *supra* note 3, para. 4.

18. Secondly, the abovementioned approach to the application of article 53 of the Rome Statute is consistent with the finding that this provision embodies the lowest standard of proof in proceedings before the Court ("*reasonable basis to proceed*").[19] Said standard was adopted solely for the purpose of determining whether to investigate a referred situation, and not for the purpose of deciding whether to charge a particular person ("*reasonable grounds to believe*") or to commit said person for trial ("*substantial grounds to believe*").[20] As clarified by the jurisprudence, the Prosecutor remains free to determine the responsible persons (if any) within the scope of the situation during the development of the subsequent proceedings.[21]

19. Accordingly, the Prosecutor must open an investigation if the information available to her provides "[a] *sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed*" and "[n]*eed not point towards only one conclusion*".[22] In this regard, the Appeals Chamber clarified that the disproval of any other reasonable conclusions is not required even for the subsequent issuance of warrants of arrest against particular individuals.[23]

20. Thirdly, the determination of whether the standard to open an investigation pursuant to article 53(1) of the Rome Statute is met requires the Prosecutor to consider the information available to her in an objective and impartial manner.[24] This duty, expressly endorsed by the Prosecutor in documents regulating the functioning of her Office,[25] stems from the wording of article 54(1) of the Rome Statute according

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[19] See the Kenya Article 15 Decision, *supra* note 10, paras. 27 and 34; and the Côte d'Ivoire Article 15 Decision, *supra* note 11, para. 24.
[20] See the Kenya Article 15 Decision, *supra* note 10, para. 28.
[21] See the Kenya Article 15 Decision, *supra* note 10, paras. 50 and 75; and the Côte d'Ivoire Article 15 Decision, *supra* note 11, para. 25.
[22] See the Kenya Article 15 Decision, *supra* note 10, paras. 34-35; and the Côte d'Ivoire Article 15 Decision, *supra* note 11, para. 24. See also the Prosecutor's Decision, *supra* note 3, para. 4.
[23] See the "Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'" (Appeals Chamber), No. ICC-02/05-01/09-73 OA, 03 February 2010, para. 33.
[24] See the Prosecution Response, *supra* note 5, para. 23.
[25] See the Regulations of the Office of the Prosecutor, Doc. ICC-BD/05-01-09, 23 April 2009, regulation 24; the Code of Conduct for the Office of the Prosecutor, 5 September 2013, article 8(c), available at

to which she shall "[i]*n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute*", and "[t]*ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court*".

21. The jurisprudence clarified that, in fulfilling this duty, the Prosecutor need not resolve legal complexities when deciding whether there is a reasonable basis to proceed to investigate alleged crimes. This is explained by the Prosecutor's limited powers during the preliminary examination phase *vis-à-vis* those afforded to her during the eventually ensuing investigation.[26]

22. Fourthly, in light of the low standard of proof to be met and the limited powers enjoyed during preliminary examinations, the Prosecutor cannot apply the jurisdictional and gravity requirements to open an investigation in the most restrictive manner. Otherwise, the Prosecutor would deny the *effet utile* of the relevant provisions of the Rome Statute, which, as indicated *supra*, provide for a presumption in favour of investigating situations referred to the Court. A more flexible interpretation of these statutory requirements is consistent with the principle of effectiveness (*ut res magis valeat quam pereat*) embodied in article 31 of the Vienna Convention on the Law of Treaties,[27] applicable before the Court.[28]

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http://www.icc-cpi.int/iccdocs/oj/otp-COC-Eng.PDF; and the Policy Paper on Preliminary Examinations, *supra* note 16, paras. 28-33.

[26] See the Kenya Article 15 Decision, *supra* note 10, para. 27.

[27] See (1966) Yearbook of the International Law Commission, Vol. II, p. 219 ("[w]*hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted*").

[28] See, *inter alia*, the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 33; the "Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled 'Decision on the Defence Request Concerning Languages'" (Appeals Chamber), No. ICC-01/04-01/07-522 OA3, 27 May 2008, paras. 38-39; the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'" (Appeals Chamber), No. ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 40; the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre

23. Moreover, the Principal Counsel contends that the Prosecutor's decisions under article 53 of the Rome Statute must be fully consistent with the policy standards she adopted for this purpose, and cannot pick and choose from them as she sees fit. Otherwise, the Prosecutor's behaviour would be impermissibly random and arbitrary.

24. Lastly, considering the abovementioned presumption to act upon referrals, the low standard of proof applicable at this stage, the Prosecutor's duty of objectivity and impartiality, her limited powers to collect information during preliminary examinations, and her policies for the conduct of said examinations, the Principal Counsel submits that the standard for review of a decision by the Prosecutor not to investigate a situation referred to her ought to be whether an impartial and objective observer in the same position as the Prosecutor (*i.e.* with access to the same information) would have reasonably reached the same conclusion.[29]

25. In order to determine whether this standard was upheld in the Prosecutor's Decision, the Principal Counsel contends that a decision under article 53 of the Rome Statute must be reasoned, and that an analysis must be conducted as to (i) whether the Prosecutor evaluated the information available to her in an impartial and objective manner, and (ii) whether the decision not to open the investigation was reasonable in light of said information.

Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'" (Appeals Chamber), No. ICC-01/05-01/08-1019 OA4, 19 November 2010, footnote 74.

[29] See, *inter alia*, ECHR, *Weeks v. United Kingdom*, Application no. 9787/82, Judgment (Plenary), 2 March 1987, para. 69. See also ECHR, *Fayed v. United Kingdom*, Application no. 17101/90, Judgment, 21 September 1990, paras. 44-45.

2. On the Prosecutor's evaluation of the available information

26. Applying the legal criteria identified *supra*,[30] the Principal Counsel submits that the Prosecutor did not evaluate all the information available to her in an impartial and objective manner because she (i) relied exclusively on conflicting reports to reach her Decision, (ii) did not weigh properly the information available to her, (iii) misapplied the evidentiary standard applicable during preliminary examinations, and (iv) unreasonably assessed the elements of the alleged crimes.

2.1. The Prosecutor failed to consider and refer to all the relevant information available to her

27. Firstly, the Principal Counsel argues that the Prosecutor did not provide any explanation for her exclusive reliance on international governmental reports in the Decision, and her lack of consideration for all other relevant information, such as victims' statements and applications, information provided by Comoros and other States, and reports prepared by third parties, such as non-governmental organisations ("NGOs"). Instead, on the sole basis of said reports, the Prosecutor ventured in the Decision into reaching conclusions not required by article 53 of the Rome Statute, frequently without citing the sources relied upon for this purpose.

28. The Principal Counsel notes that the Prosecutor mainly grounded the Decision on her analysis of the following four documents (the "Reports"): (i) the Report of the International Fact-Finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance (the "HRC Report");[31] (ii) the Report of the Secretary-General's Panel of Inquiry on the 31 May

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[30] See *supra* paras. 24-25.

[31] See the "Report of the International Fact-Finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance", UN Doc. A/HRC/15/21, 27 September 2010 (the "HRC Report"), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.pdf.

2010 Flotilla Incident (the "Palmer-Uribe Report");[32] (iii) the Report of the Turkish National Commission of Inquiry on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010 (the "Turkish Report");[33] and (iv) Parts One and Two of the Report of the Public Commission to Examine the Maritime Incident of 31 May 2010, the Turkel Commission (the "Turkel Report" and the "Second Turkel Report", respectively).[34]

29. However, contrary to her own policy,[35] the Prosecutor seems not to have taken the most basic step of considering or examining the available accounts of witnesses and victims or the crime scene. In particular, the Prosecutor failed to consider in the Decision the dozens of victims' statements appended by Comoros to the Referral and the ones provided in the Supplemental Submissions before the adoption of the Decision.[36] Indeed, the Prosecutor's Decision does not make a single reference to the statement of any victim.[37]

30. Similarly, the Prosecutor did not take any steps with the Chamber or the Registry to have access to and consider the victims' applications for participation in the Situation, and even sought to limit the victims' participation in the review proceedings before the Chamber.[38]

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[32] See the "Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident", September 2011 (the "Palmer-Uribe Report"), available at http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf.

[33] See the "Turkish National Commission of Inquiry, Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010", February 2011 (the "Turkish Report"), available at http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf.

[34] See the "The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission, January 2011, Report Part One" (the "Turkel Report"), available at http://www.turkel-committee.gov.il/files/wordocs//8707200211english.pdf; and "The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission, February 2013, Second Report" (the "Second Turkel Report"), available at http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf.

[35] See the Policy Paper on Preliminary Examinations, *supra* note 16, para. 90.

[36] See the Referral, *supra* note 1, para. 11 [REDACTED]; and the Supplemental Submissions, *supra* note 2, [REDACTED]. See also the Application for Review, *supra* note 4, paras. 33-34 and 41.

[37] See the Prosecution Response, *supra* note 5, para. 21.

[38] See the Application for Review, *supra* note 4, para. 91.

31. When it comes to information from States, the Prosecutor did not comply with her own policy when failing to consider any argument or material provided by Comoros,[39] and requested instead observations only from Turkey and Israel, without providing any explanation as to why she failed to do the same for other States Parties, such as Greece and Cambodia, and non-States Parties, such as Togo and Kiribati, whose vessels were also part of the flotilla. The Principal Counsel sees no reason why any of these States could not have provided the Prosecutor with relevant information for her decision on the Referral. In any event, as argued *supra*,[40] the Prosecutor should have made explicit in the Decision her reasons (if any) not to rely on this information.

32. The Prosecutor adopted a similar approach to relevant information available through other sources, failing to request or at least to consider information from other UN bodies and NGOs. For instance, the Prosecutor did not provide valid reasons as to why reports mentioned in the Referral as relevant to the Situation, such as the IHH report and the Goldstone Report,[41] did not deserve her consideration.

33. Instead, the Decision addresses matters that must not necessarily be decided upon when evaluating whether to open or not an investigation into the Situation, such as the (in)existence of grounds for excluding criminal responsibility,[42] and appears to seek to reach definitive findings with respect to the crimes alleged. By contrast, the Principal Counsel contends that many of the crucial conclusions reached by the Prosecutor in the Decision lack express citations to the supporting information,[43] such as the conclusion on the reasons for the Israeli failure to suspend

[39] See the Policy Paper on Preliminary Examinations, *supra* note 16, para. 33; and the Application for Review, *supra* note 4, paras. 34-38.
[40] See *supra* paras. 24-25.
[41] See the Application for Review, *supra* note 4, para. 41.
[42] *Idem*, para. 114.
[43] See the Prosecutor's Decision, *supra* note 3, para. 3; and the Prosecution Response, *supra* note 5, para. 21.

the attack on the vessels[44] and on the intent behind said attack,[45] which as such requires the opening of an investigation for its elucidation.[46]

34. In conclusion, the Principal Counsel submits that the Prosecutor, by relying exclusively on conflicting reports to reach her Decision, failed to consider crucially relevant information and took into account irrelevant information, basing important aspects of the Decision on unsupported facts or statements.

2.2. The Prosecutor failed to distinguish and properly weigh the Reports

35. Secondly, the Principal Counsel argues that had the Prosecutor given an appropriate weight to each of the Reports and had she taken into account the source of said reports in order to establish their reliability, as well as the reliability of the information contained therein, she could not have reasonably concluded that the threshold to open an investigation of the Situation was not reached.

36. Indeed, some statements contained in the Decision raise serious concerns about the methodology applied by the Prosecutor to evaluate the information available during the preliminary examination of the Situation. Whereas the Prosecutor is correct in stating that the determination of the gravity of the potential cases must be the result of a factual analysis,[47] the lack of consideration of the manner in which the available information was received undermines the validity of the method used to perform said factual analysis.[48] In this regard, the Principal Counsel reiterates the Prosecutor's duty of objectivity and impartiality, and her obligation to provide a *fully* reasoned decision not to proceed with an investigation.[49]

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[44] See the Prosecution Response, *supra* note 5, para. 50.
[45] *Idem*, paras. 48-49 and 56.
[46] See the Application for Review, *supra* note 4, para. 9.
[47] See the Prosecution Response, *supra* note 5, para. 26.
[48] *Idem*.
[49] See *supra* paras. 20 and 25.

37. Moreover, in her evaluation, the Prosecutor seems to misapply the standard of proof for the purposes of the opening of an investigation ("*reasonable basis to proceed*"). As argued *supra*,[50] a reasonable basis does not require a *full* verification of the allegations against the backcloth of the information available to the Prosecutor. Accordingly, where the information on the events contained in the Reports was found to be *significantly conflicting*,[51] the Prosecutor should have proceeded, at most, to evaluate the impartiality and credibility of the sources of each of the four Reports, in order to give the appropriate weight to each piece of information.

38. By contrast, the Decision fails to expressly consider the reliability and weight to be given to each of the Reports – which for the Prosecutor largely form the basis of the "available information" – and consequently fails to assess the conflicting information stemming from these four documents. It is apparent that the Prosecutor's failure to reach a conclusion in relation to clearly contradictory information cannot be the basis for breaching the presumption that she will investigate a situation upon a referral from a State Party.[52]

39. In this regard, the Principal Counsel stresses that the Turkish and the Turkel Reports are documents emanating from the two governments directly involved in the events that took place between 31 May and 5 June 2010. Both governments take strong and unilateral positions while assessing their own responsibilities and the responsibilities of their nationals implicated in the events. This approach has a substantial impact when looking at the reliability of the Reports. This is even clearer for the Turkel Report, as crucial accounts contained therein have been found by the UN Human Rights Council to be "*so inconsistent and contradictory*"[53] that it had no other option than to reject them. In the same way, NGOs such as Amnesty

[50] See *supra* para. 17.
[51] See the Prosecutor's Decision, *supra* note 3, *inter alia* paras. 41, 63-64 and 67.
[52] See *supra* para. 16.
[53] See the HRC Report, *supra* note 31, para. 116.

International and Human Rights Watch have questioned the impartiality of the Turkel inquiry and have subsequently rejected its findings.[54]

40. All these elements allow to conclude that there is a worrying lack of clarity as to how the Prosecutor distinguished and/or resolved the conflicting information in the Turkel and Turkish Reports and whether, in doing so, she correctly applied the presumption in favour of investigating.

41. In fact, consistent with her failure to consider the victims' views,[55] the Prosecutor appears to have given the most weight to the Commission that interviewed the lowest number of victims, *i.e.* the Turkel Commission.[56] As conceded in the report, the Turkel Commission did not interview the victims of the attack.[57] Moreover, as a further difference with the Turkish Commission,[58] the Turkel Commission did not have access to autopsy reports and other forensic evidence, and relied almost exclusively on factual information provided by IDF soldiers and other security agencies accused by the victims of inhuman treatment and violent interrogation techniques.[59]

42. As regards the Palmer-Uribe Report, the Principal Counsel recalls that the Panel of Inquiry was given the narrow mandate of receiving and reviewing the reports of the national investigations[60] with a view to recommending ways of

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[54] See *inter alia* Amnesty International public statement, "Israeli inquiry into Gaza flotilla deaths no more than a 'whitewash'", 28 January 2011, available at https://www.amnesty.org/en/documents/MDE15/013/2011/en/; and Human Rights Watch, Israel/Gaza: Weak Mandate Undermines Flotilla Inquiry, 16 June 2010, available at http://www.hrw.org/news/2010/06/16/israelgaza-weak-mandate-undermines-flotilla-inquiry.

[55] See *supra* paras. 29-30.

[56] The Prosecutor's Decision cites the Turkel Report 78 times, followed by the Palmer-Uribe Report (56 times), the HRC Report (48 times), and the Turkish Report (37 times).

[57] See the Turkel Report, *supra* note 34, p. 11.

[58] See the Turkish Report, *supra* note 33, p. 121

[59] See the Application for Review, *supra* note 4, para. 116.

[60] The narrow mandate and political composition of the Panel of Inquiry was criticized at the time of the announcement of its creation by the FIDH. See "FIDH Deeply Concerned by the Composition of UN Panel of Inquiry in the Flotilla Events - Open Letter to United Nations Secretary General Ban Ki-moon", 6 August 2010, available at https://www.fidh.org/International-Federation-for-Human-

avoiding similar incidents in the future,[61] and "[p]*ositively affect the relationship between Turkey and Israel, as well as the overall situation in the Middle East*".[62] At no time did the Panel perform an independent investigation nor had it access to first hand evidence. Furthermore, no consensus could be reached by the Panel as regards any procedural issue, finding or recommendation,[63] and both the Turkish and the Israeli representatives appended a dissenting statement reflecting the conclusions of their own national investigations.[64]

43. On the contrary, the HRC Report is the only document emanating from a third party not involved in the events. The Human Rights Council appointed an international fact-finding mission with the specific mandate of "[i]*nvestigating the facts and circumstances surrounding the boarding by Israeli military personnel of a flotilla of ships bound for Gaza and to determine whether in the process violations occurred of international law, including international humanitarian and human rights law*",[65] with the assistance of "[e]*xternal specialists in forensic pathology, military issues, firearms, the law of the sea and international humanitarian law*".[66] The experts considered an extensive amount of relevant evidence, including the testimony collected from some victims.[67]

44. Given its source, the mandate of the experts who investigated the events and its intrinsic neutrality, the HRC Report reflects the type of evidence on which the

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Rights/north-africa-middle-east/israel-occupied-palestinian-territories/FIDH-Deeply-Concerned-by-the.

[61] See the Palmer-Uribe Report, *supra* note 32, p. 3.

[62] See the daily press briefing by the Office of the Spokesperson for the Secretary-General, 2 August 2010, available at http://www.un.org/News/briefings/docs/2010/db100802.doc.htm.

[63] See the Palmer-Uribe Report, *supra* note 32, p. 3 ("[t]*he Panel's Method of Work provided that the Panel was to operate by consensus, but where, despite best efforts, it was not possible to achieve consensus, the Chair and Vice-Chair could agree on any procedural issue, finding or recommendation*").

[64] *Idem*, pp. 104-105.

[65] See the HRC Report, *supra* note 31, para. 4.

[66] *Idem*, para. 3.

[67] *Ibid*., para. 190 and Annex I, para. 7.

Prosecutor heavily relied in previous instances when deciding or requesting authorisation to open an investigation.[68]

45. Regrettably in this instance, the Prosecutor's Decision does not consider the impartiality of the HRC Report and consequently fails to attach the appropriate weight and reliability to the information contained therein. On the contrary and without providing any explanation, the Prosecutor seems to greatly rely on the national reports, to the point that in several occasions she found the information to be "*significantly conflicting*" even when the accounts were consistent in the other three reports and only differed in the Turkel Report.[69]

46. In conclusion, the Principal Counsel contends that the Prosecutor, by relying equally on each of the Reports, failed to discriminate in favour of the HRC Report in case of conflicting views. In light of its composition, mandate, methodology, and the extent of information considered therein, the HRC Report should have been granted the highest evidentiary weight during the preliminary examination.

2.3. The Prosecutor failed to consider and apply the correct evidentiary standard to the Reports

47. Thirdly, assuming *arguendo* the Prosecutor's contention that there is conflicting information regarding the events,[70] the Principal Counsel submits that this type of controversy cannot serve as the basis for a finding that no reasonable basis exists to proceed with an investigation pursuant to article 53(1) of the Rome Statute. To the contrary, the Prosecutor is required to investigate this type of scenarios "[i]*n order to establish the truth*" of what happened pursuant to article 54(1) of the Rome Statute.

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[68] See, *inter alia*, the "Situation in Mali, Article 53(1) Report", 16 January 2013. The Report was mainly built on the accounts of UN and human rights NGOs independent reports. See also, in relation to the situation in Côte d'Ivoire, the "Request for authorisation of an investigation pursuant to article 15", No. ICC-02/11-3, 23 June 2011, paras. 26-32.
[69] See the Prosecutor's Decision, *supra* note 3, *inter alia* paras. 41, 64 and 67-68.
[70] *Idem*.

48. The Principal Counsel sympathizes with the Prosecutor's difficulties when faced with contradictory reports on a politically charged situation such as the one at hand. However, she submits that, although it may be necessary to examine all possible perspectives of the contested facts during the preliminary examination, it is wholly unnecessary to reach a definitive conclusion on them before the start of an investigation. Reaching said conclusion would indeed defeat the purpose of any subsequent investigation and it would mean, *de facto*, to "put the cart before the horse".

49. In particular, the Prosecutor refers to sources supporting the non-criminal character or the justification of some of the alleged conducts, *i.e.* self-defence, as the basis for not opening an investigation.[71] In this regard, the Principal Counsel submits that since at least one reliable source points at the illegality of said conduct,[72] it is the duty of the Prosecutor to investigate and establish the truth of said allegation.

50. In more general terms, even conflicting information and contested evidence can still provide a "reasonable basis" to conclude that an investigation must be conducted into *potential* crimes committed in *potential* cases. Otherwise, it will be impossible to determine for sure the legality or illegality of the conduct(s) at hand.

51. Therefore, the Prosecutor, by reaching final conclusions on validly contested legal points, misapplied the standard of proof applicable to decide whether to open an investigation.

[71] *Ibid*., *inter alia*, paras. 55-57, 61, 67-68, 77, 103-109 and footnote 108.
[72] See the HRC Report, *supra* note 31, paras. 56-58 and 262.

2.4. The Prosecutor unreasonably assessed the elements of the alleged crimes

52. Lastly, the Principal Counsel argues that an impartial and objective observer could not have reasonably reached many of the Prosecutor's conclusions regarding the facts of the Situation.

53. The Prosecutor's Decision unreasonably disregards all the available information and fails to appropriately weigh the only independent investigation conducted by the HRC experts in this regard. Had the Prosecutor properly examined the available information, she could not have reasonably concluded that there is no reasonable basis to believe that neither the crime of intentionally directing attacks against civilians not taking direct part in hostilities pursuant to article 8(2)(b)(i) of the Rome Statute,[73] nor the crime of intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians pursuant to article 8(2)(b)(iv) of the Rome Statute[74] were committed by the IDF soldiers.

54. In particular, concerning the crucial issue of whether the IDF soldiers used live ammunition before the boarding of the *Mavi Marmara*, the Prosecutor found that the fact could not be established because of the significantly conflicting accounts contained in the Reports.[75] In this regard, the Principal Counsel submits that the Prosecutor consciously disregarded the information contained in the HRC Report, where it was concluded that "[l]*ive ammunition was used from the helicopter onto the top deck prior to the descent of the soldiers*".[76] This information is not contradicted by the

[73] See the Prosecutor's Decision, *supra* note 3, paras. 97-99.
[74] *Idem*, paras. 100-110.
[75] *Ibid*., para. 42.
[76] See the HRC Report, *supra* note 31, paras. 114 and 117. Instead, the Prosecution refers to paras. 112 and 115 where the experts state that it was not clear whether live ammunition was also fired from the zodiac boats and the difficulty to delineate the exact course of the events on the top deck. The use of live ammunition prior the boarding is in no case put in question by the experts. See the Prosecutor's Decision, *supra* note 3, para. 41, footnote 72. See also the Application for Review, *supra* note 4, paras. 100-104 and 105.

Palmer-Uribe Report. In fact, said Panel acknowledged that "[p]*hotographs show bullet marks on the funnel of the vessel, which appear consistent with firing from above*", and that "[t]*he wounds of several of the deceased were also consistent with bullets being fired from above*".[77] Moreover, it established that, on the basis of evidence put forward by the Israeli investigation itself and contrary to the conclusions reached in this regard by the Turkel Report,[78] the speedboats were equipped and ready to make use of live fire as there is evidence that it was also employed once the boarding operation was underway.[79] By the same token, the Turkish Report stated that "[t]*he Israeli soldiers shot from the helicopter onto the Mavi Marmara using live ammunition and killing two passengers before any Israeli soldier descended on the deck*",[80] and that "*eyewitness accounts converge on the fact that, at this stage, Israeli forces began firing live ammunition onto the Mavi Marmara from helicopters and zodiacs*".[81]

55. Contrary to the Prosecutor's findings in this regard,[82] shooting live ammunitions against the passengers before boarding the vessel – thus, even before encountering some direct resistance – constitutes a reasonable basis to believe that civilian passengers aboard the vessels were indeed the object of the IDF attacks. Therefore it is submitted that the factual distinction drawn by the Prosecutor between an attack directed towards the vessels and an attack on the passengers[83] is unreasonable and irrelevant.

56. As regards the crime of intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians pursuant to article 8(2)(b)(iv) of the Rome Statute, the Prosecutor placed undue weight on mitigating and possible exonerating information while underestimating the

[77] See the Palmer-Uribe Report, *supra* note 32, para. 122.
[78] See the Turkel Report, *supra* note 34, paras. 128 and 140.
[79] *Idem*, para. 121, footnote 376. In particular the Panel refers to CCTV footage from the *Mavi Marmara* showing a passenger being killed by live fire shots from one of the speedboats.
[80] See the Turkish Report, *supra* note 33, p. 4.
[81] *Idem*, p. 21.
[82] See the Prosecutor's Response, *supra* note 5, paras. 28 and 39.
[83] *Idem*, para. 28.

aggravating aspects. Indeed, she unreasonably concluded that the available information does not suggest that the IDF anticipated that the attack would cause incidental killing or injury of civilians.[84]

57. In this regard, the HRC Report clearly states that the Israeli forces should have "[r]*e-evaluated their plans when it became obvious that putting their soldiers on board the ship may lead to civilian casualties*",[85] *i.e.* notably after their attempt to board the vessel from the zodiacs. The Prosecutor seems at first to agree with this finding by affirming that "[i]*n the lead-up to the incident, the Israeli authorities and IDF forces may have anticipated that passengers of the flotilla would react with hostility and opposition to their intervention, and therefore would have expected some degree of civilian casualties or damage to result from the non-consensual interception and boarding of the vessel by force*".[86] However, without providing any further reasoning, the Prosecutor eventually concluded that since the IDF could not anticipate the exact number of deaths and injuries that could be caused by the attack, it could not anticipate that the impact on civilians would be *clearly excessive*.[87]

58. The Principal Counsel finds the Prosecutor's legal characterisation of the facts and the assessment of what is "*clearly excessive*" highly unreasonable. The Prosecutor does not explain how the anticipated *incidental* killing of certain number of civilians – in the words of the Prosecutor "*some degree of casualties*" – does not meet the requirement of excessiveness in relation to the anticipated military advantage, *i.e.* enforcing the blockade against a flotilla known to be constituted by unarmed civilian activists.[88] By the same token, the Prosecutor's assumption that the IDF was not "[o]*ffered an obvious and reasonable opportunity to disengage*"[89] is plainly unreasonable.

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[84] See the Prosecutor's Decision, *supra* note 3, para. 110.
[85] See the HRC Report, *supra* note 31, para. 113. See, in agreement, the Palmer-Uribe Report, *supra* note 32, para. 116.
[86] See the Prosecutor's Decision, *supra* note 3, para. 109.
[87] *Idem*.
[88] See the Turkel Report, *supra* note 34, para. 190. See also the Turkish Report, *supra* note 33, pp. 14-15; and the HRC Report, *supra* note 31, p. 55.
[89] See the Prosecution Response, *supra* note 5, para. 50.

Indeed, the IDF was first confronted with some resistance from the passengers before boarding the vessels. Furthermore, as indicated *supra*, there is evidence that the IDF started shooting against the passengers from the zodiacs and the helicopters in response to said resistance.[90]

59. In the same vein, the Prosecutor unduly undervalued the available information contained in the HRC Report regarding the commission of the crimes of torture pursuant to article 8(2)(a)(ii)-1 and of inhuman treatment pursuant to article 8(2)(a)(ii)-2 of the Rome Statute,[91] concluding that "[i]*t does not appear that the mistreatment by the IDF amounts to infliction of "*severe*" pain or suffering so as to fall within the intended scope of inhumane treatment* [under said provision]".[92] In this regard it is recalled that, pursuant to the Elements of the Crimes, both torture and inhuman treatment require the infliction of severe physical or mental pain or suffering upon one or more persons. The difference lies with the fact that the crime of torture further requires that such pain or suffering be specifically inflicted for the purposes of "[o]*btaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind*".[93]

60. The information contained in the HRC Report indicates that "[d]*uring the period of detention on board the Mavi Marmara the passengers were subjected to treatment that was cruel and inhuman in nature and which did not respect the inherent dignity of persons who have been deprived of their liberty*".[94] The HRC experts expressed their deep concern about the widespread use of tight handcuffing of passengers not only on board the *Mavi Marmara* but also of passengers on board the *Challenger 1*, the *Sfendoni* and the *Eleftheri Mesogios*.[95] In this regard the experts were satisfied that "[t]*he manner in which the handcuffs were used was clearly unnecessary and deliberately used to cause pain*

[90] See *supra* paras. 54-55.
[91] See the Prosecutor's Decision, *supra* note 3, paras. 62-69.
[92] *Idem*, para. 69.
[93] See the Elements of Crimes, articles 8(2)(a)(ii)-1 and 8(2)(a)(ii)-2.
[94] See the HRC Report, *supra* note 31, para. 178.
[95] *Idem*, para. 179.

and suffering to passengers", as such the Report concludes that "[i]*nsofar as these abuses amounted to the deliberate punishment of the passengers, or were an attempt to intimidate or coerce one or more of the passengers for participation in the flotilla and/or activities to prevent the interception of the flotilla, the treatment tended* ***towards torture***".[96]

61. The HRC Report thus determined that the IDF treatment of passengers on board the *Mavi Marmara* and on board the *Challenger 1,* the *Sfendoni* and the *Eleftheri Mesogios* amounted to cruel, inhuman and degrading treatment and, insofar as the treatment was additionally applied as a form of punishment, torture.[97] The same conclusions were reached by the HRC experts in relation to the treatment of the passengers once on Israeli territory.[98]

62. By the same token, the Palmer-Uribe Report concluded that "[t]*here are good grounds to believe that there was significant mistreatment of passengers by Israeli authorities after completion of the takeover of the vessels*".[99] It further added that the statements of the 93 witnesses that the Panel took into account are more consistent in relation to this event than any other they related about.[100] The Report, while acknowledging substantial differences between the Turkish and Turkel Report on this issue,[101] found that "[t]*he general explanations offered by the Israeli report and subsequently by the Point of Contact do not answer all the specific allegations made in the witness statements*".[102]

63. Both the HRC Report and the Palmer-Uribe Report established that the following forms of maltreatment were committed: large number of persons being forced to kneel on the outer decks in harsh conditions for many hours; physical mistreatment and verbal abuse being inflicted on many; widespread use of

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[96] *Ibid.*, para. 180 (emphasis added).
[97] *Ibid.*, para. 181.
[98] *Ibid*., paras. 218-220. The same conclusions were reached in the Palmer-Uribe Report, *supra* note 32, para. 140.
[99] See the Palmer-Uribe Report, *supra* note 32, para. 137.
[100] *Idem*.
[101] *Ibid*., para. 136.
[102] *Ibid*. para. 137.

unnecessarily tight handcuffing; and denial of access to basic human needs such as the use of toilet facilities and the provision of food.[103]

64. In addition, the Palmer-Uribe Report underlined that the "[m]*istreatment was not restricted to those individuals that could be considered to have represented a direct threat to the IDF or other personnel*".[104]

65. In this regard, the Principal Counsel recalls that under customary international law,[105] the crime of inhuman treatment has consistently been interpreted by international human rights bodies as including instances of active maltreatment but also in cases of very poor conditions of detention,[106] and lack of adequate food, water or medical treatment for detained persons.[107] All of them are relevant circumstances in the context at hand.

66. In light of the above, it is submitted that the Prosecutor, unreasonably and without providing any legal reasoning, failed to consider the mistreatment of those on board of the vessels as a conduct amounting to the infliction of pain or suffering

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[103] See the HRC Report, *supra* note 31, para. 178 and the Palmer-Uribe Report, *supra* note 32, para. 139.
[104] See the Palmer-Uribe Report, *supra* note 32, para. 139.
[105] See ICRC, *Study on customary international humanitarian law conducted by the International Committee of the Red Cross – Volume I*, Cambridge University Press, 2009, pp. 318-319, available at https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf.
[106] See *inter alia* the UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/INT_CCPR_GEC_6621_E.doc. See also UN Human Rights Committee, *Gómez de Voituret v. Uruguay*, Views, Communication No. 109/1981, 22 July 1983, UN Doc. Supp. No. 40 (A/39/40), para. 8.7; and *Espinoza de Polay v. Peru*, Views, Communication No. 577/1994, 6 November 1997, UN Doc. CCPR/C/61/D/57/1994. See also European Committee for the Prevention of Torture, Second General Report on the CPT's activities covering the period 1 January to 31 December 1991, CPT/Inf (92) 3 [EN], 13 April 1992; and Inter-American Court of Human Rights, *Velásquez Rodríguez* ***v.*** *Honduras*, Judgment, 29 July 1988, Series C No. 4, paras. 155-156; and *Castillo Petruzzi and Others v. Peru*, Judgment, 26 June 1987, Series C No. 41.
[107] See, *inter alia*, the UN Human Rights Committee, *Essono Mika Miha v. Equatorial Guinea*, Views, Communication No. 414/1990, UN Doc. CCPR/C/51/D/414/1990, 8 July 1994, para. 6.4; UN Human Rights Committee, *Williams v. Jamaica*, Views, Communication No. 609/1995, UN Doc. CCPR/C/61/D/609/1995, 4 November 1997, para. 6.5; European Court of Human Rights, *Keenan v. United Kingdom*, No. 27229/95, Judgment, 3 April 2001, para. 115; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Nigeria*, Communication No. 151/96, 15 November 1999, para. 27.

severe enough for the purpose of their characterisation as inhuman treatment under article 8(2)(a)(ii)-2, and consequently as one of the elements required by article 8(2)(a)(ii)-1 for the crime of torture.[108]

67. In this regard, victims consulted for the purpose of providing observations in the proceedings have consistently indicated to have been subjected to treatment that was cruel and inhuman in nature and that their dignity was not respected. In particular, victims reported having been handcuffed and subject to the threat of a gun, deprived of basic needs, such as water and food or the possibility to go to the toilet while staying hours exposed to the weather conditions, insulted and subject to beatings.[109] Some of the victims also indicated that as Muslims they felt discriminated on the basis of their religion and/or nationality. In this regard, some European passengers of the vessels contacted for the purposes of these proceedings indicated having noticed a difference in treatment between them and the Turkish passengers on board insofar they were treated better and some of them even authorised to leave the ship once in Ashdod (Israel).[110]

68. In conclusion, the Principal Counsel contends that the Prosecutor, by failing to consider all relevant information, unreasonably concluded that there was no basis to open an investigation into alleged crimes under articles 8(2)(a)(ii), 8(2)(b)(i), and 8(2)(b)(iv) of the Rome Statute.

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[108] See the Prosecutor's Decision, *supra* note 3, paras. 69 and 139.

[109] As examples, see the victims' statements provided to the Istanbul Office of the Chief Public Prosecutor Investigation File Nr. 2010/23967, pp. 17-19, 26, 33, 36-37, 46-49, 54, 69-70, 86, 101, 103, 118, 131, 140; all documents attached to the Referral. See also the Application for Review, *supra* note 4, paras. 94-96; and TUBA KOR (Z.), "Witnesses of the Freedom Flotilla: Interviews with Passengers", IHH Kitap, Istanbul, August 2011, available at https://witnessesofthefreedomflotilla.wordpress.com/. See also a/15092/12, a/40018/13 and a/40065/13.

[110] See a/40018/13 and a/40065/13.

3. On the Prosecutor's decision not to open an investigation

69. Applying the legal criteria identified *supra*,[111] the Principal Counsel argues that the Prosecutor's Decision not to open an investigation in light of the information available to her is unreasonable because she (i) did not complete the required jurisdictional analysis, (ii) failed to properly weigh all gravity factors, and (iii) failed to conduct the required complementarity analysis.

3.1. The Prosecutor's jurisdictional analysis is incomplete

3.1.1. The Prosecutor's failure to take into account the continuous character of the alleged crimes

70. Firstly, the Principal Counsel submits that the Prosecutor unreasonably restricted the territorial jurisdiction of the Court by failing to take into account all the factual parameters of the continuous crimes of inhuman and degrading treatment and torture, namely their conduct, consequences and circumstances. Consequently, the Court retains jurisdiction over the crimes allegedly committed during the victims' transportation to and detention in Israel.

71. Pursuant to article 12(2)(a) of the Rome Statute, the Court can exercise its jurisdiction in relation to the conduct of nationals of non-States Parties that took place on the territory of a State Party or on vessels and aircraft registered therein. The vessels in the flotilla whilst in international waters were also subject to the jurisdiction of the flag States, namely Cambodia (*Rachel Corrie*), Comoros (*Mavi Marmara*), Greece (*Eleftheri Mesogios*), Kiribati (*Defne Y*), Togo (*Sfendoni*), Turkey (*Gazze 1*) and the United States of America (*Challenger 1*). Of these States of

[111] See *supra* paras. 24-25.

registration, only Cambodia, Greece and Comoros are States Parties.[112] Therefore, the Court has unquestionably territorial jurisdiction over the events that occurred respectively on the *Rachel Corrie*, the *Mavi Marmara* and the *Eleftheri Mesogios*.

72. Furthermore, the Principal Counsel notes that, contrary to the approach adopted by the Prosecutor,[113] the Court retains its territorial jurisdiction over the continuous crimes of inhuman and degrading treatment and torture that allegedly took place in part on Israeli territory. Indeed, although Israel is not a State Party, the commission of said crimes, which started on board of the three vessels registered in State Parties, was extended on Israeli territory. The mentioned criminal conduct took place in the context of the unlawful detention that started after the interception of the vessels, continued during the transportation of the passengers to Israel and reached its culmination in Israeli prisons.

73. Whereas the Rome Statute does not provide a definition of the expression "*conduct in question*" for the purposes of its article 12(2)(a), its meaning can be deduced from article 30 of the Rome Statute, which indicates by implication that the material elements of the relevant crimes are to be construed as including their three distinct components: conduct, consequences and circumstances.[114]

74. In this regard, States are generally allowed under international law to exercise their criminal jurisdiction on the basis of the constructive localisation of *any* constituent element of a crime within their territory.[115] In the famous *Lotus* case, the

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[112] Cambodia deposited its instrument of ratification of the Rome Statute on 11 April 2002; Greece on 15 May 2002 and Comoros on 18 August 2006. See the United Nations Treaty Collection, Chapter XVIII, treaty no. 38544, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.

[113] See the Prosecution's Decision, *supra* note 3, pp. 5 and 13, and paras. 25, 138 and 143.

[114] See also Elements of the Crimes, General Introduction, para. 7.

[115] See, *inter alia*, article 15(2)(c) of the United Nations Transitional Organized Crime Convention, 12 December 2000, entered into force 25 December 2003, UNGA Res. 55/25 (GAOR Suppl. No. 49), UN Doc. A/45/49; article 7(2)(a-c) of the International Convention for the Suppression of the Financing Terrorism, 9 December 1999, entered into force 10 April 2002, UNGA Res. 54/109, UN Doc.

Permanent Court of International Justice confirmed unequivocally that States may exercise criminal jurisdiction "[i]*f one of the constituent elements of the offence, and more especially its effects, have taken place there*".[116]

75. In light of the above, the Principal Counsel submits that the Prosecutor's analysis of the territorial jurisdiction of the Court regarding the Situation fails to properly assess the conduct element of the alleged crimes by disregarding the fact that the criminal conduct of inhuman and degrading treatment and torture continued during the transportation and detention of the passengers into Israeli territory.

76. Furthermore, the Prosecutor completely disregarded the consequential and circumstantial elements of said crimes. Indeed, whereas the Prosecutor rightly referred in the Decision to the "*interception operation*" as a whole – including thus all the seven vessels,[117] she nonetheless failed to assess this circumstance as a constitutive element of the alleged crimes in question.

77. As a result, when considering the overall criminal conduct within the context of the "flotilla incident", the Prosecutor unreasonably restricted the jurisdiction of the Court by failing to take into account all the factual parameters of the alleged crimes. The Principal Counsel submits that, on the contrary, the criminal disposition of any court of law presupposes the examination of all the attendant factual and mental elements of a crime.[118]

78. Accordingly, in assessing the events, also for the purposes of defining the territorial jurisdiction of the Court, the "*conduct in question*" has to be interpreted as

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A/RES/54/109; and article IV(a) of the Inter-American Convention on forced Disappearance of Persons, 6 September 1994, entered into force 28 March 1996. See in this sense, VAGIAS (M.), *The Territorial Jurisdiction of the International Criminal Court*, Cambridge University Press, 2014, p. 108.

[116] See PCIJ, Case of the S.S. Lotus *(France v. Turkey)* PCIJ Rep. Ser. A, No. 10 (1927), p. 23.

[117] See the Prosecution's Decision, *supra* note 3, paras. 12-13, 99, 107 and 138.

[118] See ICTY, *Prosecutor v. Delalić et al*., Judgment, IT-96-21-T, 16 November 1998, paras. 424-425.

including all the "[h]*istorical facts relevant for the subsumption under the legal qualification*".[119] The Principal Counsel submits that a stricter interpretation of the term "*conduct*" under article 12(2)(a) of the Rome Statute would defeat the purpose of the Court to end impunity and deter the further commission of crimes.[120]

3.1.2. The Prosecutor's failure to consider the temporal dimension of the alleged crimes

79. Secondly, the Principal Counsel contends that the temporal scope of the Situation elapses from the interception of the *Mavi Marmara* and other vessels on 31 May 2010 until and including the interception of the *Rachel Corrie* on 5 June 2010.

80. As mentioned *supra*, only Cambodia, Greece and Comoros are flag States of the vessels in the Situation that are also States Parties.[121] Cambodia deposited its instrument of ratification of the Rome Statute on 11 April 2002, Greece on 15 May 2002, and Comoros on 18 August 2006.[122] Therefore, pursuant to article 126 of the Rome Statute, the Court has jurisdiction over crimes committed on the territory or on vessels and aircraft registered in Cambodia as of 1 July 2002, in Greece as of 1 August 2002 and in Comoros as of 1 November 2006.

81. The events at the basis of the Referral began on 31 May 2010 and comprise all alleged crimes resulting from the interception of the flotilla by the IDF, including the related interception of the *Rachel Corrie* on 5 June 2010 and the treatment of the passengers following said interception, during the time of their detention and prior to their repatriation to their countries of origin.[123] By analogy with the definition of "continuing crimes" provided by Pre-Trial Chamber III in the Côte d'Ivoire situation,

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[119] See TALLGREN (I.) and CORACINI (A.R.), "Article 20: *Ne bis in idem*", in TRIFFTERER (O.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd Ed., Beck-Hart-Nomos, 2008, p. 692.
[120] See the Rome Statute, Preamble.
[121] See *supra* para. 71.
[122] See s*upra* note 112.
[123] See *supra* paras. 72-74. See also the Referral, *supra* note 1, paras. 48-49.

the Court retains temporal jurisdiction over crimes involving, at least in a broad sense, the same actors and that have been committed within the context of either the same attacks (crimes against humanity) or the same conflict (war crimes).[124]

82. Thirdly, the Principal Counsel argues that the Prosecutor made a selective reading of the information available to her, resulting in an unreasonable limitation of the material jurisdiction of the Court.

83. Concerning the war crimes allegedly committed against protected persons in the context of and associated with the "occupation" of Gaza by Israel, the Principal Counsel appreciates the Prosecutor's decision to "[p]*roceed on the basis that the victims are protected persons for the limited purpose of this preliminary examination*".[125] Nonetheless, it must be noted that regardless of the impact of the occupation on the legal situation of the victims, the lawful or unlawful character of the Israeli blockade is a key issue to determine the legality of the conduct within the scope of the Situation. Indeed, were the blockade considered lawful, the Prosecutor should analyse whether the attack conducted by the IDF was proportionate or not. Conversely, were the blockade considered unlawful, the Prosecutor should consider whether the IDF followed its rules of engagement with the civilians in the vessels.

84. In this regard, the Principal Counsel submits that it was unreasonable for the Prosecutor (i) not to address any argument related to the lawfulness of said blockade, and (ii) to state that she does not take a position on the issue, while (iii) ultimately providing an analysis that is mainly premised on the assumption that the blockade is lawful.

[124] See the Côte d'Ivoire Article 15 Decision, *supra* note 11, para. 179.
[125] See the Prosecution's Decision, *supra* note 3, para. 44.

3.1.3. The Prosecutor's failure to take a position on the (un)lawfulness of the blockade

85. The Principal Counsel submits that the Prosecutor's Decision is unreasonable in so far it failed to take a position on the lawfulness of the blockade. In failing to identify the unlawful character of the blockade under international law of armed conflicts, the Prosecutor committed an error that permeates the entire Decision.

86. As explained *supra*, the mere fact that the Prosecutor conducted her analysis taking into account both the lawful and unlawful character of the blockade[126] is, in itself, a recognition that there is reasonable basis to believe that the blockade is unlawful.

87. Moreover, the Prosecutor's failure to reach a conclusion in relation to the lawfulness of the blockade constitutes a material error. This error is clearer in view of the Prosecutor's recognition that the "[i]*ssue is relevant, to a certain extent, to the* […] *assessment of the interception of the flotilla and the alleged commission of crimes within the Court's jurisdiction*".[127] All the reports relied upon by the Prosecutor appear to have addressed the issue.[128] Likewise, the mere fact that the legality of the blockade is "*subject to controversy*"[129] does not justify the Prosecutor's failure to take a position on the lawfulness of the blockade. It is part of the Prosecutor's role to consider *all* arguments that are relevant to the crimes alleged and to assess them against the applicable standard of proof.

88. Moreover, the Principal Counsel notes that the Prosecutor did not only fail to take a position on the lawfulness of the blockade, but also refrained from referring to any of the arguments made in relation to this issue. Indeed, while the Prosecutor

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[126] *Idem*, para. 18.
[127] *Ibid*., para. 30.
[128] *Ibid*., footnote 42, where the Prosecutor makes reference to the findings in the Turkel Report, the Palmer-Uribe Report, the Turkish Report and the HRC Report.
[129] *Ibid*., para. 18.

asserted that the lawfulness of the blockade is "*subject of controversy*",[130] nowhere in the Decision is there a discussion of the different views regarding the lawfulness of the blockade as such, nor did the Prosecutor examine the lawfulness of the interception of the vessels and the capture of civilians participating in the flotilla.

89. Instead, the Prosecutor presented a brief analysis of some of the consequences deriving from either the lawfulness or unlawfulness of the blockade.[131] In this regard, the Principal Counsel concurs with the Prosecutor's assertion that "[i]*f the blockade was unlawful, then Israel would not have been legally entitled to take measures to enforce the blockade, including those of capture and attack as outlined above*".[132] However, she strongly disagrees with the Prosecutor's contention that the "[i]*ssue of the legality of the blockade* […] *only has an impact on the assessment of the alleged war crime of intentionally directing an attack against civilian objects (under article 8(2)(b)(ii))*".[133] This assertion is plainly incorrect. As clarified *infra*, the Prosecutor's ambiguous approach to the legality of the blockade affected the overall analysis in her Decision, including the assessment of several war crimes in respect of which the Prosecutor found no reasonable basis to believe that they were committed.

90. Whereas the Principal Counsel admits that it is true that the legality of the blockade may affect the Prosecutor's determination concerning the war crime of intentionally directing an attack against civilian objects under article 8(2)(b)(ii) of the Rome Statute, the mere consideration of the lawfulness of the blockade has much wider implications. Such an assessment may lead to the consideration of different acts and crimes, such as the interception and capture of vessels, or the detention and mistreatment of civilian passengers. It also makes it necessary for the Prosecutor to examine the wider context in which the alleged crimes were committed. Moreover, it may serve to clarify the actual intent and knowledge behind the interception of the vessels. Most of these aspects were either not considered at all in the Decision or

[130] *Idem*.
[131] *Ibid*., paras. 30-32.
[132] *Ibid*., para. 32.
[133] *Ibid*., para. 33.

were found to be insufficiently supported by evidence. For instance, the unlawful nature of the blockade would be inconsistent with the Prosecutor's conclusions in relation to the mental element of the crime of intentionally directing attacks against civilians under article 8(2)(b)(i) of the Rome Statute. In particular, it would serve to refute the assertion according to which "[n]*one of the information available suggests that the intended object of the attack was the civilian passengers on board these vessels*".[134] Similarly, the unlawfulness of the blockade would help identifying the intent of the alleged perpetrators in relation to the crime of intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians pursuant to article 8(2)(b)(iv) of the Rome Statute. Indeed, the unlawfulness of the blockade (and hence, of the attack itself) would demonstrate the unreasonableness of the Prosecutor's finding that the "[i]*nformation is insufficient to conclude* […] *that the anticipated civilian impact would have been clearly excessive in relation to the anticipated military advantage of enforcement of the blockade*".[135]

3.1.4. The Prosecutor's analysis is almost entirely premised on the lawful nature of the blockade

91. Contrary to the Prosecutor's assertion that it "[h]*as conducted its analysis* [taking] *into account both possibilities of a lawful and unlawful blockade*",[136] the Principal Counsel submits that, actually, the Decision provides an assessment that is almost exclusively based on the premise that the blockade is lawful.

92. Indeed, the Prosecutor's stated position is as follows:

> "*If the blockade is lawful, then Israel would have been entitled (and in a sense obligated) to take certain actions against vessels, such as the flotilla, in order to enforce it. Namely, the blockading power may intercept and capture neutral*

[134] *Ibid*., para. 99.
[135] *Ibid*., para. 109.
[136] *Ibid*., executive summary, para. 18.

> *vessels believed on reasonable grounds to be breaching the blockade. Additionally, such vessels may be lawfully subject to attack if "after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture". This follows from the consideration that such clear resistance to interception or capture renders the vessels legitimate military objectives. Any such attack nevertheless would have to comply with the* ***principles of distinction, precaution, and proportionality****. In the alternative, if the blockade was unlawful, then Israel* ***would not have been legally entitled to take measures to enforce the blockade****, including those of capture and attack as outlined above".*[137]

93. Accordingly, the Prosecutor's position is that the principles of distinction, precaution and proportionality of the attack can only be considered in case the blockade is found to be lawful. In contrast, in the event that the blockade is found to be unlawful, Israel would not have been entitled to take any measure to enforce the blockade. In the latter case, any measure taken to enforce the blockade would be considered unlawful.

94. The Principal Counsel submits that the analysis of the constitutive elements of war crimes in the Prosecutor's Decision is mainly based on the assumption that the blockade is lawful. With the exception of the crime under article 8(2)(a)(iv) of the Rome Statute,[138] in respect of which the Prosecutor contemplated the two possibilities (*i.e.* the lawfulness and unlawfulness of the blockade), the legality of many of the acts examined in the context of other war crimes was not questioned by the Prosecutor. These acts would have been considered unlawful if the blockade is contrary to international law. This alternative scenario was not contemplated by the Prosecutor in many instances, particularly in the context of the alleged war crimes that were ultimately dismissed.

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[137] *Ibid*., para. 32 (emphasis added).
[138] *Ibid*., paras. 90-96.

95. This structural error has an important impact on the overall conclusions adopted by the Prosecutor. It affects the assumptions which the Prosecutor relied upon to conclude that there is no reasonable basis to believe that crimes under articles 8(2)(a)(ii)-2,[139] 8(2)(a)(iii),[140] 8(2)(a)(iv),[141] 8(2)(b)(i),[142] 8(2)(b)(iii)[143] and 8(2)(b)(iv)[144] of the Rome Statute were committed.

96. The flawed approach adopted by the Prosecutor had at least two direct consequences. First, it led to an incomplete and partial consideration of the specific acts constituting war crimes under the Rome Statute. This is because the Prosecutor did not address the legality of the acts related to the "detention" of passengers and the "takeover" of the vessels *per se*, but rather considered mainly the events that took place after the takeover of the vessels.[145] One manifestation of this flawed approach is the Prosecutor's failure to consider the actual intent behind the attack, stating for instance that "[i]*t is unclear whether the difficulties that some wounded passengers encountered in receiving medical treatment was due to the deliberate acts of the IDF or alternatively was an unintended consequence of the logistical and practical difficulties*".[146] If the Prosecutor had considered the unlawful character of the blockade, as well as the unlawful nature of the attack on the vessels, it would have cleared any doubts regarding the perpetrators' intent as an element of the crime of inhuman treatment under article 8(2)(a)(ii)-2 of the Rome Statute. The Prosecutor would also have found that the unlawful raid on the vessels, which resulted in dozens of passengers being

[139] *Ibid*., paras. 62-72.
[140] *Ibid*., paras. 73-82.
[141] *Ibid*., paras. 83-89.
[142] *Ibid*., paras. 97-99.
[143] *Ibid*., paras. 111 *et seq*.
[144] *Ibid*., paras. 100-110.
[145] For instance, see *ibid*., paras. 63 ("[t]*he findings of the Turkish and Turkel Commissions regarding the treatment the passengers on board the Mavi Marmara after the takeover differ significantly*") and 64 ("*after the initial takeover*").
[146] *Ibid*., para. 68.

injured, may amount to an infliction of "severe" pain and suffering constitutive of inhuman treatment under article 8(2)(a)(ii)-2 of the Rome Statute.[147]

97. Furthermore, the lack of consideration of the possibility that the blockade may be unlawful led the Prosecutor to focus exclusively on the conformity of the acts constituting the attack with the principles of distinction, precaution, and proportionality, rather than on the unlawfulness of said acts *per se*. As recognized by the Prosecutor,[148] this consideration could only be examined if the blockade is found to be lawful. For ease of reference, the Principal Counsel lists some of the findings in the Prosecutor's Decision which are exclusively based on the assumption that the blockade is lawful, with no consideration of the possible unlawfulness of the blockade. These findings are as follows:

- The Prosecutor concluded that "[a]*lthough the Israeli authorities may have had a legitimate interest in initially confiscating and examining magnetic media, even by their own account these items were intended to be returned after completion of investigations – though it appears that this did not happen in all cases*".[149] If the blockade is considered unlawful, this conclusion cannot stand. The IDF would have no legitimate interest in taking said measures.

- The Prosecutor asserted that "[o]*verall, there is insufficient information available at this stage to ascertain the extent of the appropriation of personal belongings as to indicate whether such appropriation occurred in limited, isolated instances or on a more extensive scale*".[150] This conclusion only applies in the event that the blockade is lawful. In contrast, if the blockade was unlawful, the appropriation in several private vessels would also be unlawful. Seizure of several vessels would certainly meet the requirement that the appropriation

[147] *Contra* the Prosecutor's Decision, *supra* note 3, para. 69.
[148] *Idem*, para. 32.
[149] *Ibid*., para. 85.
[150] *Ibid*., para. 89.

must be "extensive". However, the Prosecutor completely overlooks the destruction and appropriation of the flotilla vessels when assessing the crime of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly pursuant to article 8(2)(a)(iv).[151]

- The Prosecutor found that "[n]*one of the information available suggests that the intended object of the attack was the civilian passengers on board these vessels. Rather, viewed in the context of the interception operation, such an attack (i.e., the forcible boarding) appears to have been solely directed at the vessels*".[152] Had the Prosecutor considered the (un)lawfulness of the blockade, she would have clarified whether the perpetrators' intent was directed at the civilian passengers or not.

- The Prosecutor justified the blockade on the basis of the perceived military advantage, finding that "[t]*he interception of the flotilla occurred in the context of the Israeli forces' enforcement of the naval blockade, which it imposed for the military objective of preventing the flow of arms to Hamas and entry of "terrorists" to Gaza by sea. Irrespective of its lawfulness, Israel would have viewed its enforcement as essential to ensure that the blockade remained effective and thus perceived a military advantage in intercepting the flotilla. Nevertheless, the manner of such enforcement by the IDF forces would have had to comply with the principle of proportionality*".[153] Had the Prosecutor considered the unlawfulness of the blockade, she would have found that there is no need to consider the proportionality of the attack, since the attack itself would be unlawful. In the latter case, Israel could not have intercepted the flotilla. This scenario is not discussed in the context of the analysis of the war crime under article 8(2)(b)(iv) of the Rome Statute.

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[151] *Ibid*., paras. 83-89. Elsewhere in the Report, the Prosecutor takes the view that "[t]*he interception operation, such an attack* (i.e., *the forcible boarding) appears to have been solely directed at the vessels*". *Ibid*., para. 99.
[152] *Ibid*., para. 99.
[153] *Ibid*., para. 104.

- The Prosecutor's analysis of the crimes under articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute implicitly justifies the blockade and does not appear to question any of the measures applied to enforce it. In this regard, the Prosecutor stated that "[t]*he information available, however, indicates that by March 2010, Israel began engaging in diplomatic efforts with various countries from which the vessels of the flotilla were to depart, including Turkey, Greece, the UK, Ireland, Egypt, and the US, in order to reach a solution to the problem posed by the flotilla. These efforts included offers by Israel, as conveyed to the flotilla organisers through Turkish officials, to facilitate the delivery of the humanitarian supplies from the flotilla to Gaza as to make unnecessary the need to challenge the blockade* […] *Additionally, in the warnings radioed to each of the flotilla vessels in the hours prior to the interception, Israeli authorities reiterated that the humanitarian supplies could be delivered to Gaza via the land crossing and invited the vessels to divert their course and go to Ashdod port in Israel for this purpose*".[154]

- The Prosecutor asserted that *"*[i]*n this context, it is also noted that the fact that civilian casualties are caused during an attack does not as such render it unlawful as incidental civilian casualties or damage, which are not expected to be excessive in relation to the concrete and direct military advantage anticipated, are legally acceptable"*.[155] If the blockade was unlawful, an attack of any form would be considered unlawful.

98. Said findings provide examples of the instances where the Prosecutor proceeded on the basis that the blockade was lawful. Therefore, the Principal Counsel submits that said findings could not have been reasonably reached without concluding that the blockade is lawful, which, in effect, contradicts the Prosecutor's stated view that she did not intend to take a position on this issue. Moreover, it was unreasonable for the Prosecutor to take this implied position on the blockade without

[154] *Ibid*., para. 119.
[155] *Ibid*., footnote 171, para. 43.

considering or making a legal analysis of the various arguments in relation to the lawfulness of the blockade.

3.1.5. The unlawful character of the blockade

99. As outlined *supra*, the Principal Counsel contends that should the Prosecutor have analysed the matter, she would have reached the conclusion that the blockade imposed on Gaza is unlawful.

100. The 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, on which the Prosecutor relies,[156] provides that:

> *"102. The declaration or establishment of a blockade is prohibited if:*
> *(a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or*
> *(b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.*
> *103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:*
> *(a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and*
> *(b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross".*[157]

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[156] *Ibid*., para. 31.
[157] See the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, available at https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/560?opendocument, articles 102-103.

101. Accordingly, the unlawfulness of the blockade may be established in two different ways, either (i) by demonstrating that the blockade had "[t]*he sole purpose of starving the civilian population or denying it other objects essential for its survival*", or (ii) by establishing that "[t]*he damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade*". Alternatively, the unlawfulness of the interception of the vessels *per se* may also be determined by establishing that the "[b]*lockaded territory is inadequately provided with food and other objects essential for its survival*" and that "[t]*he blockading party must* [have provided] *for free passage of such foodstuffs and other essential supplies*".

102. The Principal Counsel submits that there is, at the very least, a reasonable basis to believe that the blockade is unlawful, in accordance with the guidelines set out in article 102(b) of the San Remo Manual. It is submitted that "[t]*he damage to the civilian population is*, [and was] *expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade*". This view is supported by the HRC Report, which found that "[t]*he policy of blockade or closure regime, including the naval blockade imposed by Israel on Gaza was inflicting disproportionate civilian damage*".[158] Said Report also took the view that "[t]*he closure regime is considered* […] *to constitute collective punishment of the people living in the Gaza Strip and thus to be illegal and contrary to article 33 of the Fourth Geneva Convention*".[159] The Principal Counsel further notes that the Turkel Report found the blockade to be lawful.[160] However, even said report recognized the intricate nature of the issue.[161]

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[158] See the HRC Report, *supra* note 31, para. 59.
[159] *Idem*, para. 60.
[160] See the Turkel Report, *supra* note 34, paras. 58-60.
[161] The relevant part of the Turkel Report reads as follows: "*Initially we thought that the investigation of the circumstances in which the naval blockade was imposed on the Gaza Strip and enforced and the legality of these actions would not require the consideration of difficult factual and legal questions. But it soon became clear to us that the investigation would be lengthy and complex, and require a detailed study both of fact and law. We therefore asked the Government to extend the powers of the commission and to increase the number of its members (from three, at the time of the original appointment, to five), in order to enable it to carry out its duties in an optimal manner*". See the Turkel Report, *supra* note 34, "Preface to the Report", p. 13.

103. The Principal Counsel recognizes the complexity of the factual and legal aspects related to the establishment and enforcement of the blockade. These aspects cannot be exhaustively considered and assessed in the context of article 53 proceedings, nor will a preliminary examination enable the Prosecutor to reach definitive conclusions on the various elements of the blockade. However, the complexity of the matter certainly warrants the opening of an investigation.

104. In conclusion, the Prosecutor failed to consider the aspects related to the lawfulness of the blockade and the interception of the vessels on the basis that the legality of the blockade is the "*subject of controversy*". The Principal Counsel contends that this approach is unreasonable, since the Prosecutor was only required to assess whether there is a reasonable basis to believe that the blockade is unlawful, and the Prosecutor failed to do so. Even if the lawfulness of the blockade was contested, there is a reasonable basis to believe that the blockade is unlawful because, as indicated *supra*,[162] the "reasonable basis" standard is the lowest evidentiary threshold before the Court. The Principal Counsel therefore respectfully requests the Chamber to instruct the Prosecutor to proceed on the basis that the blockade is unlawful for the purpose of the preliminary examination and to review all the findings made on the assumption that the blockade was lawful.

3.1.6. The Prosecutor's failure to address the link between the alleged crimes and the characterisation of the armed conflict

105. Concerning the possible connection of the alleged crimes with an ongoing armed conflict, the Principal Counsel submits that the Prosecutor made again a selective reference to the contextual elements of the war crimes, particularly with respect to the different aspects of the armed conflict between Israel and Hamas.

106. At first, the Prosecutor established that "[t]*he hostilities between Israel and Hamas at the relevant time do not appear to meet the threshold of an international armed conflict in*

[162] See *supra* para. 18.

terms of a conflict taking place 'between two or more States', either directly or by proxy".[163] The Prosecutor did not provide any explanation for this conclusion. Nor did she clarify whether, in her view, she considered that at the relevant time there was an armed conflict of any sort (in the sense of resort to armed force) between Hamas and Israel. Nevertheless, the Prosecutor noted that "[t]*he prevalent view within the international community is that Israel remains an occupying power in Gaza despite the 2005 disengagement*".[164] Accordingly, she concluded that the "[s]*ituation in Gaza can be considered within the framework of an international armed conflict in view of the continuing military occupation by Israel*".[165]

107. The latter statement seems to suggest that the Prosecutor would solely analyse the alleged crimes in the context of a military occupation of Gaza by Israel. However, this is not the case. Indeed, when analysing the crime of wilful killing under article 8(2)(a)(i) of the Rome Statute, the Prosecutor contemplated the possibility that the passengers' resistance to the IDF interception and boarding of the vessel be considered as "[t]*aking a direct part in hostilities so as to deprive those particular passengers of their protected civilian status*".[166] This possibility was dismissed on the basis that "[t]*he information available does not indicate that the crew and passengers' actions were specifically designed to support Hamas by harming Israel*".[167] This statement demonstrates, however, that the Prosecutor took into account the existence of an ongoing armed conflict between Israel and Hamas.

108. The Prosecutor concluded that the "[s]*ituation in Gaza can be considered within the framework of an international armed conflict in view of the continuing military occupation by Israel*".[168] She further stated that "[t]*he analysis conducted and the conclusions reached would generally not be affected and still be applicable, if the Office was of*

[163] See the Prosecutor's Decision, *supra* note 3, para. 21.
[164] *Idem*, para. 27.
[165] *Ibid*., para. 29.
[166] *Ibid*., para. 49.
[167] *Ibid*., para. 50.
[168] *Ibid*., para. 16.

the view, alternatively, that the law applicable in the present context and in light of the Israel-Hamas conflict is the law of non-international armed conflict".[169]

109. The Principal Counsel submits that this statement is incorrect. The distinction between international and non-international armed conflict is crucial in the context of the implementation of a naval blockade. This is because the most widely accepted restatement of the rules of naval warfare, the San Remo Manual, "[d]*oes not expressly deal with non-international armed conflicts*" and is "[p]*rimarily meant to apply to international armed conflicts at sea*".[170] The content of the rules of naval warfare applicable to non-international armed conflicts is therefore uncertain and the mere availability of blockade in said conflicts is doubtful. As outlined *supra*,[171] the question related to the lawfulness of the blockade materially affected the Prosecutor's conclusions.

110. More generally, the character of the armed conflict in the Situation may also have other material implications for the scope of the alleged crimes concerned, given that both types of crimes are governed by different provisions under the Rome Statute.

3.1.7. The Prosecutor's failure to address the contextual elements of the alleged crimes against humanity

111. Lastly, the Principal Counsel submits that the Prosecutor's evaluation of the allegations that crimes against humanity were committed in the Situation is extremely brief, unsubstantiated, and can only support a premature decision not to open an investigation for lack of jurisdiction.

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[169] *Ibid*., para. 17.
[170] See DOSWALD-BECK (L.) and others (eds.), *San Remo Manual* (Explanation), pp. 63, 73 (noting the possible "implementation of these rules in non-international armed conflicts" *de lege ferenda*) and 74 (referring to lack of clarity as to whether rules applicable to neutrals can be invoked in any conflict "irrespective of its scale or duration").
[171] See *supra* paras. 83-104.

112. The Prosecutor briefly concluded that there is no reasonable basis to believe that crimes against humanity were committed in the Situation on the ground that the required contextual elements are not met by the events in question. For this purpose, the Prosecutor simply recalled the five contextual elements of crimes against humanity under article 7 of the Rome Statute – *i.e.* (i) an attack against any civilian population, (ii) a State or organisational policy, (iii) an attack of a widespread or systematic nature, (iv) a nexus between the individual act and the attack, and (v) the accused's knowledge of the attack – but did not conduct any factual or legal analysis of said elements.[172] Instead, she plainly stated that "[o]*n the basis of the information available, it does not appear that the conduct of the IDF during the flotilla incident was committed as part of widespread or systematic attack, or constituted in itself a widespread or systematic attack, directed against a civilian population*".[173]

113. The "widespread" requirement in article 7(1) of the Rome Statute describes a quantitative element, such as the number of victims,[174] or its extension over a broad geographic area and the large nature of the attack.[175] However, as pointed out by Pre-Trial Chamber II in the Kenya Situation, "[t]*he assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts. Accordingly, a widespread attack may be the 'cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'*".[176]

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[172] See the Prosecutor's Decision, *supra* note 3, para. 129.
[173] *Idem*, para. 130.
[174] See 1996 Draft Code, commentary on art. 18(4) ("[t]*he* […] *alternative requires the inhumane acts be committed on a large scale meaning that the acts are directed against a multiplicity of victims*").
[175] See the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (Pre-Trial Chamber I), No. ICC-02/05-01/09-34 March 2009, para. 81; and the "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-01/04-01/07-717, 30 September 2008, paras. 394-397. By the same token, the jurisprudence of the *ad hoc* Tribunals repeatedly affirmed that this concept includes "*massive, frequent, large-scale actions carried out collectively with considerable seriousness and directed against a multiplicity of victims*". In this sense, see ICTR, *Prosecutor v. Akayesu*, Trial Judgment, No. ICTR-96-4-T, 2 September 1998, para. 580; ICTY, *Prosecutor v. Kunarac et al.,* Appeal judgement, No. IT-96-23/1-A, 12 June 2001, para. 95; SCSL, *Prosecutor v. Brima et al.*, Trial Judgment, No. SCSL-2004-16-T, 20 June 2007, para. 215; and SCSL, *Prosecutor v. Fofana & Kondewa*, Trial Judgment, No. SCSL-04-14-T, 2 August 2007, para. 112.
[176] See the Kenya Article 15 Decision, *supra* note 10, para. 95. See also the Côte d'Ivoire Article 15 Decision, *supra* note 11, para. 53; the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo"(Pre-Trial Chamber II), No. ICC-

114. Accordingly, the Principal Counsel contends that the information available to the Prosecutor provides a reasonable basis to believe that the attack against the flotilla was, considered on its own, widespread in nature, and considered in its context, widespread and/or systematic in character.

115. Considered in isolation, the alleged crimes involved a high number of victims because the *Mavi Marmara* alone counted with over 550 passengers.[177] Moreover, the same facts considered in the context of the similar actions conducted against similar vessels can reasonably be seen as widespread and systematic, since they appear to evidence an Israeli policy *vis-à-vis* this type of flotillas.

116. The referral also provides a reasonable basis to believe that the other contextual elements of crimes against humanity, namely the attack being directed against a civilian population and the knowledge of said attack, may be present,[178] in particular regarding the murder, severe deprivation of physical liberty, torture and other inhumane acts noted in the Reports.

117. Therefore, the Principal Counsel submits that the Prosecutor did not complete the required jurisdictional analysis, in so far as she failed to consider crimes allegedly committed on Israeli soil, did not take into account the crimes allegedly committed after the interception of the *Rachel Corrie*, did not adopt a decision on the (un)lawful character of the Israeli blockade, did not address the possible relation of the alleged crimes with the armed conflict between Israel and Hamas or between Israel and Palestine, and failed to consider critical elements that appear to conform with the contextual elements of crimes against humanity.

01/05-01/08-424, 15 June 2009, para. 83; and the "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-01/04-01/07-717, 01 October 2008, para. 394.

[177] See the Prosecutor's Decision, *supra* note 3, para. 138 and footnote 238.

[178] See the Referral, *supra* note 1, paras. 38-40.

3.2. The Prosecutor failed to properly weigh the gravity factors

118. Applying the legal criteria identified *supra*,[179] the Principal Counsel argues that the Prosecutor unreasonably restricts the scope of admissible cases arising from the Situation by failing to properly weigh all gravity factors. In particular, the Prosecutor unreasonably fails to consider the context of the alleged crimes in her gravity assessment, and is randomly selective in her analysis of the gravity criteria applicable to the events.

119. The Principal Counsel contends that the Prosecutor must assess the gravity of the cases potentially arising from the investigation of the Situation by considering the facts of said cases within the context and circumstances of said Situation. As stated by the Court, "[a]*t the preliminary examination stage* […] *gravity should be examined* ***against the backdrop of the likely set of cases or 'potential cases'*** *that would arise from investigating the situation*".[180] Consequently, the Prosecutor cannot reasonably analyse the gravity of the allegations as such, in isolation, but must consider them in the context of the entire Situation.

120. In this regard, the Prosecutor expressly refused to consider the context of the incidents allegedly committed from 31 May 2010 through 5 June 2010 on the registered vessels of the Comoros, Greece and Cambodia bound for the Gaza Strip upon finding that she was "[n]*ot entitled to assess the gravity of the alleged crimes committed by the IDF on the* Mavi Marmara *in reference to other alleged crimes falling outside the scope of the referral and the jurisdiction of the ICC*".[181]

121. However, the Principal Counsel submits that the Prosecutor reached this conclusion on the basis of an interpretation *contra legem* and not *contra proferentem* of article 8(1) of the Rome Statute. The Prosecutor's conclusion is inconsistent both with

[179] See *supra* paras. 22-23.
[180] See the Kenya Article 15 Decision, *supra* note 10, para. 58 (emphasis added). See also the Côte d'Ivoire Article 15 Decision, *supra* note 11, para. 202.
[181] See the Prosecutor's Decision, *supra* note 3, para. 137.

the purpose of the provision at hand – article 8(1) clarifies that the Court has jurisdiction on war crimes even if these are not committed as part of a plan or policy or as part of a large-scale commission –,[182] and with the rule of interpretation pursuant to which if an expression contained in a treaty provision can be shown to be ambiguous, then said provision must be read to the disadvantage of those who formulated it and not against those who rely on it.[183] In this regard, it is apparently clear that the Prosecutor's interpretation of article 8(1) does not prejudice the States that adopted the provision but only the Prosecutor by limiting the possible scope of her investigations. This approach is equally inconsistent with the principle of effectiveness discussed *supra*.[184]

122. Moreover, the Principal Counsel contends that the consequences derived from this interpretation of article 8(1) of the Rome Statute are inconsistent with the Prosecution's prior and current practice. The first Prosecutor of the Court commenced his initial investigations upon referrals by States Parties, but considered as well the long-lasting character of the conflicts between States and armed groups in the context of which the alleged crimes had been committed, noting that said conflicts preceded in some cases the very establishment of the Court.[185] Even though he understood that the threshold of article 8(1) of the Rome Statute is not an element of the crime, in his preliminary examination of the situation in Iraq, he stated that "[t]*he words 'in particular' suggest that this is not a strict requirement*".[186] In turn, the current Prosecutor feels prevented by the same provision from considering the

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[182] See COTTIER (M.), "Article 8 – War Crimes – para. 1", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, 2nd Edition, C. H. Beck, 2008, p. 300.

[183] See LINDERFALK (U.), *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer, Heidelberg, 2007, p. 284.

[184] See *supra* para. 22.

[185] See the Statement by Chief Prosecutor Luis Moreno-Ocampo, 14 October 2005 ("[t]*he LRA has mainly attacked the Acholis they claim to represent. For nineteen years the people of Northern Uganda have been killed, abducted, enslaved and raped*"), available at http://www.icc-cpi.int/NR/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda_LMO_Speech_141020091.pdf.

[186] See the OTP response to communications received concerning Iraq, 9 February 2006, p. 8, available at http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

gravity of the Situation by referring to other alleged crimes outside the scope of the Referral,[187] but immediately thereafter does not see any legal obstacle to assess the gravity of the Situation "[a]*s compared, generally, to other* [unidentified] *cases investigated by the Office*".[188] In these circumstances, it is unreasonable for the Prosecutor not to consider the gravity threshold of the Situation by taking into account its context and circumstances.

123. In any event, assuming *arguendo* that the Prosecutor is *now* duly prevented from considering other factors outside the scope of the referral in her evaluation of the gravity of the Situation, the Principal Counsel submits that she unreasonably concluded that none of the four gravity factors stipulated in regulation 29(2) of the Regulations of the Office of the Prosecutor, as confirmed by Chambers and subsequently developed in the Prosecutor's Policy Paper on Preliminary Examinations,[189] is met in the Situation.

124. The acts alleged in the Situation are certainly as serious as the acts constituting crimes in other situations over which the Prosecutor decided to investigate in the past. However, in the present instance, the Prosecutor adopted a selective approach to the four gravity factors (scale, nature, manner of commission of the crimes, and their impact), highlighting those aspects that may support a decision not to open the investigation, and not mentioning at all other factors that call for the opening of said investigation. In other words, the Prosecutor impermissibly picks and chooses from the gravity factors in a random and arbitrary fashion.[190] In light of this unreasonable approach as to the gravity of the Situation, inconsistent with the very policies of the

[187] See the Prosecutor's Decision, *supra* note 3, para. 137.
[188] *Idem*, para. 138.
[189] See the "Decision on the Confirmation of Charges" (Pre-Trial Chamber I), No. ICC-02/05-02/09-243-Red, 8 February 2010, para. 31; the Kenya Article 15 Decision, *supra* note 10, para. 188; and the Policy Paper on Preliminary Examinations, *supra* note 16, paras. 62-65.
[190] See *supra* para. 23.

Prosecutor,[191] the Principal Counsel contends that the Decision must be subject to review.

125. Firstly, regarding the scale of the alleged crimes, the Prosecutor concluded that "[t]*he potential case(s) that could be pursued is inherently limited to an event encompassing a small number of victims* [because] […] *the Court's territorial jurisdiction is further limited to events occurring on three vessels in the flotilla and does not extend to any events that occurred after passengers were taken off those vessels*".[192] Moreover, highlighting that only nine passengers were killed and around 50 others were injured on board the *Mavi Marmara*, and that "*no serious injuries*" occurred during the IDF interception of the remaining seven vessels, the Prosecutor determined that these figures were of "[r]*elatively limited proportions as compared, generally, to other cases investigated by the Office*".[193]

126. Contrary to these statements, the Principal Counsel recalls the ensuing possibility for the Prosecutor to consider the conduct and consequences on the territory of Israel of some of the alleged crimes on the basis of their continuing nature,[194] and points out that the Prosecutor fails to consider that the remaining passengers of the *Mavi Marmara* (over 400 persons) were also victimised in the Situation, as indicated elsewhere in the Decision.[195] Moreover, the Prosecutor ignored the impact on the scale of the crimes of the events in the *Rachel Corrie* and the *Eleftheri Mesogios* – limiting her analysis to the consequences arising from the interception of one of said vessels –, and did not address at all the number of indirect victims of the alleged crimes, *i.e.* the families of over 500 direct victims, only considering the *Mavi Marmara*.

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[191] See the Policy Paper on Preliminary Examinations, *supra* note 16, para. 60 ("[t]*he Appeals Chamber has dismissed the setting of an overly restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court*").
[192] See the Prosecutor's Decision, *supra* note 3, executive summary, para. 25 and para. 143.
[193] *Idem*, para. 138.
[194] See *supra* paras. 70-78.
[195] See the Prosecutor's Decision, *supra* note 3, paras. 71 and 77.

127. In these circumstances, the Principal Counsel submits that there is no apparent reason for the Prosecutor's finding that the scale of the crimes does not make the Situation grave enough. An impartial and objective observer in the same position as the Prosecutor would have reasonably concluded that most of the factors identified in the Prosecutor's policy paper for the opening of an investigation are present in the Situation, namely the concentration of high intensity crimes over a brief period of time with a high number of direct and indirect victims suffering serious bodily and/or psychological harm.[196]

128. Secondly, regarding the nature of the alleged crimes the Prosecutor concluded that although there is a reasonable basis to believe that two grave breaches of the Geneva Conventions were committed, "[t]he *information available does not indicate that the treatment inflicted on the affected passengers amounted to torture or inhuman treatment*".[197]

129. The Principal Counsel submits that the Prosecutor's application of this policy criteria ("[t]*he specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction*")[198] is too strict – in particular where the Prosecutor concedes that two grave breaches of the Geneva Conventions may have been committed. The Prosecutor's application of her policy is therefore inconsistent with the flexible interpretation required by the principle of effectiveness.[199]

130. Moreover, the commission of war crimes of torture cannot be reasonably discarded altogether,[200] and even if it is, multiple victim statements apparently not

[196] See the Policy Paper on Preliminary Examinations, *supra* note 16, para. 62.
[197] See the Prosecutor's Decision, *supra* note 3, para. 139.
[198] See the Policy Paper on Preliminary Examinations, *supra* note 16, para. 63.
[199] See *supra* para. 22.
[200] See *supra* paras. 59-65.

considered by the Prosecutor indicate that the victims were discriminated against on religious grounds.[201]

131. In these circumstances, an impartial and objective observer in the same position as the Prosecutor would have reasonably concluded that some of the crimes identified in the Prosecutor's Decision or in the Prosecutor's policy paper for the opening of an investigation are present in the Situation, namely killings and torture.

132. Thirdly, regarding the manner of commission of the crimes, the Prosecutor carried on with her consistent ambivalent approach, since she conceded that the means and extent of force used by the IDF against the passengers appeared to have been excessive, but eventually concluded that "[t]*he information available does not suggest that the alleged crimes were systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians or with particular cruelty* [and] […] *the commission of serious crimes was confined to one vessel*".[202]

133. In this regard, the Principal Counsel recalls her submission that the alleged systematic nature of the crimes may be better assessed if the allegations are considered together with their context and circumstances (*i.e.* the armed conflict between Israel and Hamas or between Israel and Palestine).[203] Nonetheless, even without considering said context and circumstances, it must be noted that "[a] *widespread attack may be the 'cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'*", such as the IDF interception of the *Mavi Marmara* on 31 May 2010.[204]

134. Moreover, the Principal Counsel contends that the Prosecutor failed to provide any explanation for her lack of consideration of the statements of multiple

[201] See *supra* para. 67.
[202] See the Prosecutor's Decision, *supra* note 3, para. 140.
[203] See *supra* para. 122.
[204] See *supra* paras. 113-115.

victims indicating that they were defenceless *vis-à-vis* the Israeli soldiers and were discriminated against for being Muslims.

135. In these circumstances, the Principal Counsel submits that there is no apparent reason for the Prosecutor's finding that the excessive use of force by the IDF against the passengers of the *Mavi Marmara* is insufficient to make the Situation grave enough. An impartial and objective observer in the same position as the Prosecutor would have reasonably concluded that many of the factors identified in the Prosecutor's policy paper for the opening of an investigation, although not expressly considered by the Prosecutor, are present in the Situation, namely the deliberate nature of the attack, the vulnerability of the victims, and the existence of motives involving discrimination.[205]

136. Fourthly, regarding the impact of the crimes, the Prosecutor concluded that "[i]t *does not appear that the conduct of the IDF during the incident can be considered to have had a significant impact on the civilian population in Gaza* [because] […] *the interception of the flotilla cannot be considered to have resulted in blocking the access of Gazan civilians to any essential humanitarian supplies on board the vessels in the flotilla*".[206] In this regard, the Principal Counsel recalls her submissions *supra* on the suffering endured by the direct victims of the crimes in the *Mavi Marmara*, given their vulnerable condition and the terror instilled on them.[207]

137. The Principal Counsel submits once again that there is no apparent reason for the Prosecutor's lack of consideration of these factors in her Decision. An impartial and objective observer in the same position as the Prosecutor would have reasonably concluded that many of these factors, identified in the Prosecutor's policy paper for the opening of an investigation,[208] are present in the Situation.

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[205] See the Policy Paper on Preliminary Examinations, *supra* note 16, para. 64.
[206] See the Prosecutor's Decision, *supra* note 3, para. 141.
[207] See *supra* para. 67.
[208] See the Policy Paper on Preliminary Examinations, *supra* note 16, para. 65.

138. Lastly, the Prosecutor states "[i]*t is clear that the potential case(s) that could be pursued as a result of an investigation into this situation is limited to an event encompassing a limited number of victims of the alleged ICC crimes*".[209] However, in light of other cases brought before the Court, this statement does not provide a reasonable argument to support the Prosecutor's conclusion that the Situation is not grave enough.

139. For instance, the Prosecutor fails to mention that she did not consider the case of *The Prosecutor v. Katanga and Ngudjolo Chui* not to be grave enough, although said case was limited to one event (the attack on the village of Bogoro on 24 February 2003) resulting in a limited number of victims *vis-à-vis* other cases brought before the Court. Similarly, the Prosecutor fails to notice that her reference to the reasoning made by Pre-Trial Chamber I in the *Abu Garda* case, regarding "*a grave impact* [of the attack] *on the local population*",[210] can be reasonably applied in the context of the Situation. Although the supplies carried by the vessels were ultimately later distributed in Gaza, the impact of the IDF interception increased the reluctance of donors and volunteers to provide their assistance, thereby damaging the conditions of the local population. The alleged impossibility to consider the flotilla as a peacekeeping or humanitarian mission, addressed at length by the Prosecutor, is not relevant for these purposes. Instead, the relevant consideration is that the Prosecutor fails to provide a reasonable argument to support her conclusion that the Situation is not grave enough.

140. In conclusion, due to the disregard for the context of the alleged crimes and the consideration mostly of factors supporting the lack of gravity of said crimes, the Prosecutor's conclusion that the potential cases arising from an investigation of the Situation would not be grave enough is unreasonable. On this basis alone, as the lack of gravity of the Situation is the ground upon which the Prosecutor's Decision

[209] See the Prosecutor's Decision, *supra* note 3, para. 144.
[210] *Idem*, para. 145, quoting the "Decision on the Confirmation of Charges", *supra* note 189, para. 33.

rests,[211] the Principal Counsel submits that the Prosecutor must be called to review the Decision.

3.3. The Prosecutor failed to conduct a complementarity analysis

141. The Principal Counsel submits that with regard to the Situation, the Prosecutor departs from her usual practice when determining the admissibility of a situation for the purposes of article 53 of the Rome Statute without an explanation. In all her previous preliminary examinations, the Prosecutor consistently assessed complementarity first, followed by gravity.[212] By contrast, the Prosecutor's analysis of the admissibility of the Situation begins and is limited to the gravity assessment of the events occurred, on the basis that she finds it "*unnecessary*" to consider or reach a conclusion on the issue of complementarity.[213]

142. The Principal Counsel contends that the Prosecutor's approach towards the Situation not only evidences the incompleteness and impropriety of her analysis,[214] but also raises serious concerns as to why she decided to firstly and solely address the gravity dimension of the admissibility assessment.

143. In any event, since the Situation is grave enough to be admissible before the Court, the Principal Counsel provides the Chamber with a brief assessment of the action or inaction of several States regarding the potential cases arising from the events.

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[211] See the "Decision on Victims' Participation", *supra* note 6, para. 10.
[212] See the "OTP Report on Preliminary Examination activities", 13 December 2011; the "OTP Report on Preliminary Examination activities 2012", November 2012; the "Report on Preliminary Examination Activities 2013", November 2013; and the "Report on Preliminary Examination Activities", 2 December 2014. The four Reports are available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/reports/Pages/default.aspx.
[213] See the Prosecutor's Decision, *supra* note 3, executive summary, para. 27 and para. 148.
[214] See *supra* sections 3.1 and 3.2.

144. The State referring the situation to the Court, Comoros, indicated in May 2013 that it remained inactive regarding the Situation, as Greece and Cambodia.[215] The Principal Counsel has no information suggesting that action has been taken in the meantime by any of these three States.

145. The State of nationality of most of the victims, Turkey, initiated a judicial investigation into the attack on the Gaza Freedom Flotilla. On 28 May 2012, the Office of Public Prosecution completed its investigation and referred the case to trial before the Seventh District of the Istanbul High Criminal Court.[216] The case was numbered 2012/264. The indictment lists a series of charges that are all based on the provisions of the Turkish Penal Code, but does not make any reference to international crimes such as war crimes or crimes against humanity. It is unclear whether the prosecution of these "ordinary crimes" would cover the same or, at least, substantially the same conduct as before the Court. Moreover, since its referral to trial, the case has been subject to considerable delays and lengthy adjournments. Only recently, on 25 May 2015, has the court conducted its first inspection of the *Mavi Marmara*.[217] Proceedings are conducted *in absentia* and the extradition of alleged perpetrators is unlikely to occur in the foreseeable future.[218]

146. Other States of nationality of the victims have also commenced judicial investigations without leading to any result. In particular, Spain started investigating

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[215] See the Referral, *supra* note 1, paras. 23-24.
[216] See "The case for Mavi Marmara: Slingshots vs helicopters", *Al Jazeera*, 14 April 2014, available at http://www.aljazeera.com/indepth/opinion/2014/04/turkey-mavi-marmara-israel-2014497516698132.html.
[217] The victims' statements and the autopsy reports filed in the Turkish investigation are attached to the Referral. See "Mavi Marmara inspected five years after Israeli attack", *Yeni Şafak*, 25 May 2015, available at http://english.yenisafak.com/world/mavi-marmara-inspected-five-years-after-israeli-attack-2149313.
[218] See "Turkish court orders arrest of four Israeli generals over Mavi Marmara", *Hürriyet Daily News*, 26 May 2014, available at http://www.hurriyetdailynews.com/turkish-court-orders-arrest-of-four-israeli-generals-over-mavi-marmara-.aspx?pageID=238&nID=66979&NewsCatID=510. See also "Turkey tries Israeli officers over Mavi Marmara raid", *Todays Zaman*, 5 November 2012, available at http://www.todayszaman.com/diplomacy_turkey-tries-israeli-officers-over-mavi-marmara-raid_297161.html.

the Situation,[219] but a recent legal amendment to the universal jurisdiction of Spanish courts appears to prevent the continuation of said proceedings, unless the suspects of the potential cases in the Situation are Spaniards, foreigners with usual residence in Spain, or foreigners on transit in Spain whose extradition has been denied by the Spanish authorities.[220]

147. Finally, Israel only conducted non-judiciary investigations leading to the conclusion, published on 23 January 2011 by the Turkel Commission appointed by the Israeli Government, that the "[t]*he naval blockade imposed on the Gaza Strip – in view of the security circumstances and Israel's efforts to comply with its humanitarian obligations – was legal pursuant to the rules of international law. The actions carried out by Israel on May 31, 2010, to enforce the naval blockade had the regrettable consequences of the loss of human life and physical injuries. Nonetheless, and despite the limited number of uses of force for which we could not reach a conclusion, the actions taken were found to be legal pursuant to the rules of international law*".[221]

148. Grounded on the general findings of the Turkel Commission, and despite the instances of uses of force for which a reasonable conclusion was not found by the Commission of experts,[222] the Israeli Government decided neither to proceed with further investigations into the events of 31 May 2010, nor to prosecute any of the soldiers involved in the actions that resulted in the harm suffered by the victims.

149. At most, in the aftermath of the events, a few investigative steps were taken against Israeli passengers of the *Mavi Marmara*, including the member of the Israeli

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[219] See preliminary investigation 197/2010 [international waters close to Israel – "Freedom Flotilla"/*Netanyahu et al.* case], Central Investigative Judge nº 5, High Court, Madrid, Decision, 17 June 2014, legal ground 2, available at http://estaticos.elmundo.es/documentos/2014/06/17/auto_flotilla.pdf.
[220] See investigation 63/2008 [China – "Tibet"/*Jiang Zemin et al.* case], Supreme Court Criminal Chamber, Madrid, appeal 1682/2014, Judgement, 6 May 2015, paras. 25 and 29-30, available at http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=7389459&links=%221682/2014%22&optimize=20150526&publicinterface=true.
[221] See the Turkel Report, *supra* note 34, p. 280.
[222] *Idem*.

Parliament Hanneen Zoabi,[223] on the ground of suspicion of attempting to enter Gaza unlawfully. However, in 2011 the Attorney General ruled against an investigation of Israeli citizens in the flotilla, stating that "[u]*pon weighing the entire body of evidence and the relevant legal issues, the Attorney General decided to close the case over significant evidence-based and legal difficulties*".[224]

150. By the same token, the Israeli Government refused to cooperate with and even recognise the UN HRC Mission created to investigate the alleged violations of international law resulting from the IDF attacks in the context of the Situation.[225]

151. In light of the above, the Principal Counsel contends that not only it appears that investigative steps were not taken towards IDF individuals involved in the flotilla incident, but also that the State of Israel has not been willing so far to carry out comprehensive, independent and impartial investigations and prosecutions regarding the events occurred.

152. Therefore, it is submitted that no national proceedings are being or have been conducted in relation to the groups of persons and the crimes allegedly committed during the incidents that would likely form the object of the Prosecutor's investigation, namely the most responsible persons of the most serious crimes within the Situation.

153. Moreover, the Principal Counsel contends that a decision not to open an investigation would not serve the interests of justice, since a refusal or delay in this

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[223] See "A-G closes case against Israeli flotilla members", *The Jerusalem Post*, 22 December 2011, available at http://www.jpost.com/Diplomacy-and-Politics/A-G-closes-case-against-Israeli-flotilla-members

[224] See "AG closes case against Israeli participants of 2010 Gaza flotilla", *Haaretz*, 22 December 2011, available at http://www.haaretz.com/news/israel/ag-closes-case-against-israeli-participants-of-2010-gaza-flotilla-1.402967#. This decision reinforces the conclusions in the Goldstone Report about the systemic limitations of the Israeli criminal justice system. See the "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict", UN Doc. A/HRC/12/48, 25 September 2009, paras. 1815 *et seq.* and 1832.

[225] See the HRC Report, *supra* note 31, p. 4; and the Prosecution Response, *supra* note 5, para. 23.

regard would reduce the potential deterrent effect of the investigation on the commission of further crimes.

III. SPECIFIC VIEWS OF VICTIMS

154. The Principal Counsel wishes to inform the Chamber that the fulfilment of her mandate to represent the interests of unrepresented victims in accordance with the Decision on Victims' Participation has been to some extent impeded by circumstances independent of her will. Indeed, after the issuance of the Decision on 24 April 2015, some victims have provided powers of attorney to the other legal representatives until at least 1st of June 2015.

155. While the Principal Counsel does not challenge the possibility for victims to freely choose their own lawyer, the fact that victims have been contacted by organisations or the team of the other legal representatives to provide said powers of attorney while already being represented by another Counsel for the limited purposes of these proceedings and without said Counsel being aware of this circumstance, has caused confusion amongst the persons concerned, as well as difficulties in reaching these victims and collecting their views and concerns.

156. Therefore, the Principal Counsel was only able to contact and meet with part of the victims she represents by order of the Chamber.

157. As a preliminary remark, the Principal Counsel notes that most of the victims appeared to be aware of the main procedural developments before the Court in relation to the Situation. Most of them were also aware of the Prosecutor's Decision not to open an investigation. As explained *infra*, the victims' reactions to the findings made by the Prosecutor in the Decision revealed mixed feelings of anger, disbelief and fear at the prospect that they may be abandoned by the Court.

158. As to the lack of a finding by the Prosecutor that the attack was unlawful *per se*, the victims indicated that the raid on the vessels was deliberate and planned.[226] Overall, victims seemed to agree that the alleged crimes form part of a wider pattern of abuses against civilians, and that the attack represents a further illustration of "*Israel's continuing disregard for international law*".[227]

159. Victims underlined that the impact of the events was massive. In this regard, one victim described the attack to the *Mavi Marmara* as having a significant impact upon a number of people: "*ten were killed, over fifty were injured, and the number of traumatised probably runs into the hundreds*".[228] Several victims have reported being diagnosed with post-traumatic stress disorder following said attack, after seeing people killed and injured in what victims have described as a humanitarian action. Victims also said that being forced to watch others suffering and being gratuitously humiliated is unbearable.[229] Moreover, victims indicated that said impact goes beyond the immediate effects of the crimes, and that the incidents had severe emotional and psychological consequences not only for the victims and their families, but also for the entire communities affected. In this respect, victims pointed to the fact that, each year, a massive commemoration is held in Istanbul where tens of thousands gather in remembrance of the victims of the attack on the flotilla.

160. Victims also heavily criticised the Prosecutor's finding that the situation was not grave enough. One victim questioned "[w]*hat is the minimum number of victims that needs to be killed*"[230] for the Prosecution to open an investigation. Another victim asked "[i]*f this situation is not grave, then what is the value for having a Court*".[231] One victim stated that perpetrators can simply get away with their crimes "[j]*ust by killing*

[226] See, for instance, a/05063/14 ("[w]*e were attacked in the international water, isn't this enough* [for the attack to be unlawful]*?*").
[227] See a/05010/14.
[228] See a/40018/13
[229] *Idem*.
[230] See a/40098/13.
[231] See a/05003/14.

their victims one by one in different days as if there was no plan behind", meaning that in this way a systematic and widespread attack could not be proven.[232]

161. With respect to the Prosecutor's finding that the flotilla lacked "neutrality", the victims indicated that the aim of the flotilla was to provide humanitarian aid. Although personal motives may differ from one participant to another, victims insisted that the primary objective of all participants was to provide moral and material support to the civilian population in Gaza.[233] In fact, some of the victims specifically raised concerns over the fact that their participation in the flotilla, or even in the instant proceedings before the Court, may be perceived as politically motivated.[234] Victims also underlined that the flotilla included participants from all ethnic, cultural and religious backgrounds, which demonstrates compliance with the principles of "humanity, impartiality and neutrality", and thus satisfies the requirements for a humanitarian operation.

162. Although some of the victims seemed to question the Prosecutor's impartiality, and asked whether the Decision was influenced by political considerations, the overwhelming majority stated that they still have hope that the ongoing proceedings would lead to a reconsideration of said Decision. In this regard, victims have indicated that this matter is so important because if an investigation is opened before the Court, this will send a signal that events of this kind might be evaluated by an independent court of law and it could have a dissuasive effect for the commission of crimes against unarmed civilians who simply seek to alleviate the suffering of other people.

163. Finally, many victims questioned the assessment of the Prosecutor in relation to the evidence provided to her. Indeed, victims indicated that for them the material

[232] See a/40098/13.
[233] See, for instance, a/05010/14; a/ 05003/14; a/50059/14; a/15026/15; a/15028/15; a/15048/15; a/14144/15; a/40025/13; a/40039/13; a/40055/13; a/40098/13; a/40132/13.
[234] See, for instance, a/15092/15.

already in the possession of the Prosecutor is largely sufficient to open and investigation and expressed their concern that the Court is not applying all available resources to obtain the further necessary information eventually necessary to open an investigation. In this regard, several victims expressed their readiness and eagerness to provide the Court with more information and evidence and to eventually appear in person before the Court.

FOR THE FOREGOING REASONS, the Principal Counsel respectfully requests the Pre-Trial Chamber to order the Prosecutor to review the Decision and to direct her to reconsider the initiation of an investigation on the war crimes and crimes against humanity allegedly committed on board the *Mavi Marmara,* the *Rachel Corrie* and the *Eleftheri Mesogios* between 31 May 2010 and 5 June 2010.

Paolina Massidda
Principal Counsel

Dated this 23rd day of June of 2015
At The Hague, The Netherlands