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PRE-TRIAL CHAMBER I

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

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

Public Document

Reply of the Government of the Comoros to the Responses of the Prosecutor and Victims on the Application of the Comoros for Judicial Review

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

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I. INTRODUCTION

1. The Counsel for the Government of the Union of the Comoros ('the Comoros'), hereby file this reply to the responses of the Prosecution[1] and the Victims[2] to the "Application for Judicial Review by the Government of the Comoros" of 2 March 2020.[3] This Reply is submitted in accordance with the Pre-Trial Chamber's "Order on the filing of responses and replies" of 6 March,[4] and the "Decision on the 'Prosecution's urgent request for extension of time.'"[5]

2. The Government of the Comoros submits that the Prosecution's Consolidated Response of 11 May 2020 is itself riddled with the same errors as the OTP's decision refusing again to open an investigation. The OTP continues to make countless premature and overly hasty conclusions about the evidence, favouring one view (consistent with the case being less grave) over others that show the gravity of the case to find that there is no reasonable basis to open an investigation. This plainly violates the Pre-Trial Chamber's directions on the applicable legal standard under Article 53. And the OTP claims wrongly that the Prosecutor can act in this way because ultimately it is her decision whether to open an investigation.

3. The OTP has embarked on a 'window dressing' exercise by in its latest decision finally acknowledging the errors as identified by the Chamber (which it had not done before) but then saying that none of them in the Prosecutor's 'discretion' make any difference at all. Most significantly, in exercising this 'discretion' the Prosecutor makes precisely the same errors again (which the Chamber clearly directed her not to do) of prematurely selecting one view of the evidence over another (even when there may be conflicts, uncertainties, or difficulties in the evidence at this preliminary stage, understandably). And doing so without any investigation, when an investigation would

[1] Prosecution's Consolidated Response to the Third "Application for Judicial Review by the Government of the Comoros" (ICC-01/13-100), and the Observations of Victims (ICC-01/13-107 and ICC-01/13-108), ICC-01/13-109, 11 May 2020 [*hereinafter* "Prosecution Consolidated Response"].
[2] Victims' Response to the "Application for Judicial Review by the Government of the Comoros" of 2 March 2020, ICC-01/13-107, 4 May 2020; and Response of the Victims to the "Application for Judicial Review by the Government of the Comoros" of 2 March 2020, ICC-01/13-108, 4 May 2020.
[3] Application for Judicial Review by the Government of the Comoros, ICC-01/13-100, 2 March 2020 [*hereinafter* "Comoros Judicial Review"].
[4] Order on the filing of responses and replies, ICC-01/13-101, 6 March 2020.
[5] Decision on the 'Prosecution's urgent request for extension of time', ICC-01/13-106, 19 March 2020.

allow proper and well founded conclusions to be drawn on the basis of a full inquiry into all of the evidence (and not on the basis of one view that the OTP seems consistently to prefer to justify closing this case). The OTP is repeatedly applying the incorrect standard under Article 53 and attempting to conceal that by claiming that the Prosecutor has the final say. The Comoros is not merely disagreeing with the OTP's interpretation of the facts as the OTP claims[6]; the Comoros is highlighting that the OTP has misapplied the applicable legal standard in error.

4. It is for these reasons that the Comoros submits that the OTP's conduct (including in its Response) amounts to a deliberate circumvention of the Pre-Trial Chamber's decision and the clear directions of both the Pre-Trial Chamber and Appeals Chamber to correct the errors in the OTP's decisions, which renders the entire judicial review procedure meaningless. The whole point of the judicial review procedure is to ensure that the final decision is based on reasoning and findings that are error free and not irrational, so that the decision is a lawful one. If it were right that the OTP can merely say in response to the Judges that it recognises the errors identified but that in its assessment none of them make any difference, there would be no reason for judicial review and its purpose would be undermined – when such judicial scrutiny of the OTP's actions to ensure that they are lawful is clearly intended by the express wording of the Statute and the States Parties who drafted and adopted it. This is especially the case when the OTP makes exactly the same errors again by choosing interpretations and assessments of the evidence precipitously that favour dismissing the case in order to justify that none of the errors identified by the Chamber are of any consequence.

5. The OTP even goes so far as to suggest that its decision in the present Situation should not be questioned because the Prosecutor has stated that she wishes to open an investigation in the Palestine Situation.[7] Each Situation should of course be judged on its own merits. As raised by the OTP it is *not* an argument in favour of closing down the present Situation. It is in fact a compelling reason to initiate an investigation in the present case particularly given that it is directly related to the situation in Gaza and Palestine. As all of the international UN reports and investigations highlight, the attack on the Gaza bound Flotilla was not an isolated incident; it occurred as a result of the

[6] Prosecution Consolidated Response, para. 26.
[7] Prosecution Consolidated Response, para. 4.

ongoing siege, blockade and occupation of Gaza and the policies of the IDF in response to those who oppose the blockade and crimes allegedly committed against the residents of Gaza.[8] All of the necessary reasons exist for the Prosecutor to take up the investigation of the present Situation alongside the investigation of the Palestine Situation, instead of looking to find any reason to reject it. There is similarly no merit in the OTP's other extraneous reasons to try to justify closing the Situation – including that the OTP has "professional experience and exclusive competence" in investigations[9] and that time and resources are limited.[10] None of these generalised, unfounded assertions justify the OTP's failure to correct the several errors of law and fact.

6. Nothing in the OTP's Response therefore provides any reason to refuse the Government's application for judicial review. It only highlights why the application should be granted and the Prosecution should be required to comply in full with the Pre-Trial Chamber's decision in respect of both the legal and factual errors identified.

7. Accordingly, the Comoros respectfully requests that the Pre-Trial Chamber grants its application and directs the Prosecution to reconsider its decision, and that the Chamber imposes sanctions in order to ensure the Prosecution actually complies with the Chamber's decision with no further delays.

[8] See, for example, 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 Human Rights Council, A/HRC/15/21, 27 September 2010, paras. 37-44. See also, Gaza Closure: not another year!, International Committee of the Red Cross, 16 June 2010 (https://www.icrc.org/en/doc/resources/documents/update/palestine-update-140610.htm); and John Dugard, Implementation of General Assembly resolution 60/251 of 15 march 2006 entitled "Human Rights Council", Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/4/17 29 January 2007 (http://unispal.un.org/UNISPAL.NSF/0/B59FE224D4A4587D8525728B00697DAA).
[9] Prosecution Consolidated Response, para. 26
[10] Prosecution Consolidated Response, para. 4.

II. INTERPRETATION OF THE APPEALS CHAMBERS JUDGMENT ON ERRORS OF LAW AND FACT, AND THE PROSECUTION'S 'DISCRETION' AND 'MARGIN OF APPRECIATION'

8. The overall premise of the OTP's Consolidated Response is entirely misplaced. The Prosecution claims that the Comoros "appears to misunderstand or to disagree with the *ratio decidendi* of the Appeals Judgment,"[11] and further alleges that the Comoros is attempting to "reinterpret the ruling of the Appeals Chamber."[12] The Prosecution asserts that because the Government submitted that the "[Pre-Trial] Chamber undoubtedly has the power to direct the OTP as to errors of fact that must be addressed and corrected,"[13] that the Comoros is trying to "reinterpret" the Appeals Chamber's Judgment and take away the margin of appreciation afforded to the Prosecution in respect of her decision whether to open an investigation, as well as the Prosecution's ability to analyse the facts and assign weight.[14]

9. This is not at all what the Government of the Comoros has argued and advocated. In its Application for Judicial Review of 2 March 2020, the Government made absolutely clear that the Appeals Chamber's decision was rightly to the effect that the Pre-Trial Chamber cannot dictate what decision the Prosecution must ultimately make at the end of its assessment. It is for the Prosecution, and the Prosecution alone, to decide "what *result* she should reach in the gravity assessment or what weight she should assign to the individual factors."[15] It is not in dispute that the Appeals Chamber recognised that the Prosecution has a "margin of appreciation in respect of her decision whether to initiate an investigation" because of the "numerous factors and information … the Prosecutor has to balance in reaching her decision."[16]

10. What the Comoros submitted in its Application for Judicial Review is that the Prosecution has misinterpreted the well-established principles above by claiming in

[11] Prosecution Consolidated Response, para. 6.
[12] Prosecution Consolidated Response, note 20.
[13] Prosecution Consolidated Response, note 20 quoting Comoros Judicial Review, para. 114. It is noted that within footnote 20 of the Prosecution Consolidated Response, the Prosecution misquotes the Comoros as saying errors of fact "must be addressed and directed". The correct quote from the Comoros is reflected above which stated that errors of fact identified by the Pre-Trial Chamber must be "addressed and corrected" by the Prosecution.
[14] Prosecution Consolidated Response, note 20.
[15] Comoros Judicial Review, paras. 113-114 quoting Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'', ICC-01/13-98, 2 September 2019, para. 81 [*hereinafter* AC Judgment] (emphasis added).
[16] AC Judgment, paras. 76, 78, 81.

effect that it can decide questions of fact regardless of the errors identified in the Pre-Trial Chamber's decision of 16 July 2015.[17] The Prosecution's discretion over the ultimate decision does not mean that the Pre-Trial Chamber's power to review the Prosecution's path to that decision for errors of fact, law or procedure are removed. The OTP is required to correct the errors identified and then make the new decision in light of those corrections, so that the decision is without legal errors and thus lawful. This plainly has not happened.

11. Of course, the final decision is that of Prosecutor, but given the several, significant errors identified by the Chamber that are critical for the gravity assessment, it could be anticipated by any independent, reasonable observer that the Prosecutor's decision should inevitably change once those errors were corrected. The errors would have been rather trivial (which they clearly are not) if their correction would have no impact at all on the final outcome.

12. In respect of the errors committed the Comoros submits that it is worrisome that within the OTP's Response at multiple points[18] the Prosecution seems erroneously to assert that the Appeals Chamber's Judgment removed the Pre-Trial Chamber's power to identify any errors of fact, and that the Pre-Trial Chamber's power has now been reduced to only identifying errors of law. The Prosecution even declares that the "Pre-Trial Chamber should decline any invitation by the Comoros … to depart from the legal conclusions in the Appeals Judgment" by making a declaration that the Pre-Trial Chamber "has the power to direct the OTP as to errors of fact that must be addressed and corrected."[19]

13. The Chamber of course has the power to identify both errors of law *and* fact that the Prosecutor is bound to correct.

14. It would be completely illogical to argue that when a decision by the Prosecution not to investigate is materially affected by errors of law and fact, that the Pre-Trial Chamber only has the power to require the Prosecutor to correct errors of law, leaving

[17] Comoros Judicial Review, para. 114.
[18] See, Prosecution Consolidated Response, paras. 7, 29, note 20.
[19] Prosecution Consolidated Response, para. 29 quoting Comoros Judicial Review, para. 144

the decision marred by errors of facts that have been identified. Indeed, the Pre-Trial Chamber has previously emphasised that a decision by the Prosecution not to investigate could be materially affected by all types of errors which the Chamber must be allowed to identify and require the Prosecution to correct during its reconsideration:

> *"Upon review, the Chamber must request the Prosecutor to reconsider her decision not to investigate if it concludes that the validity of the decision is materially affected by an error, whether it is an error of procedure, an error of law, or an error of fact."*[20]

15. The Appeals Chamber's decision plainly covered both errors of law and of fact that the OTP must address and rectify: (i) "where questions of law arise, the only authoritative interpretation of the relevant law is that espoused by the Chamber of this Court and not the Prosecution"[21]; and (ii) in respect of questions of fact, although "it is not for the pre-trial chamber to direct the Prosecutor as to how to assess this information and which factual findings she should reach", the Prosecutor must evaluate the information made available to her in accordance with the law[22] and "Prosecutor cannot ignore a request by the pre-trial chamber to take into account certain available information when determining whether there is a sufficient factual basis to initiate an investigation".[23]

16. The OTP is once again seeking in its Response to distract attention from the real issue by claiming that the Appeals Chamber intended that the OTP enjoys a wide berth about how it can go about reaching its final decision. This is reflected too in the highly convoluted and opaque language used in the OTP's analysis of how it arrives at this final decision through a 'weighing' of all factors and information 'cumulatively' (see in particular Section VI of its decision), which the OTP simply regurgitates again in its Response.

17. The bottom line is that the Appeals Chamber obviously intended that (i) the OTP must apply the law properly to the facts – so it would again be an error for the OTP to

[20] Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ICC-01/13-34, 16 July 2015 [*hereinafter* "PTC First Decision requesting Reconsideration"].
[21] AC Judgment, para. 78.
[22] AC Judgment, para. 80.
[23] AC Judgment, para. 80.

favour one version of the facts over another (when there may be conflicts, uncertainties, or difficulties in the evidence at this early stage) prematurely to find that no investigation is justified under Article 53; and (ii) that the OTP must certainly remedy errors of fact including if relevant information has been ignored or not given proper weight, or if the OTP has again reiterated a conclusion that no reasonable person could reach or which is irrational. The latter is the well-established test for an error of fact.[24] It is a clearly recognised error of fact to give insufficient weight to relevant evidence, or to reach an irrational conclusion.[25] The assignment of weight is never solely a matter for a prosecutor. If a prosecutor gets it wrong, the Judges are perfectly entitled to identify that as an error which must be corrected by the prosecutor by giving the evidence such sufficient weight. No prosecutor is permitted to say that they accept the law to be applied as established by the Judges and then apply it by making the same error again, nor to say that they accept that relevant information must be taken into account and given weight and then to give it no weight at all and only favour other contrasting evidence which is consistent with the case being insufficiently grave. This completely undercuts the proper application of the legal standard under Article 53, which permits relevant evidence consistent with satisfying the gravity threshold to be taken into account at this stage of the proceedings even if there is other evidence that may show the opposite. As the Appeals Chamber made clear[26], the Judges cannot direct the Prosecutor as to the weight she must assign evidence in reaching her final decision – that decision is hers – but there is no doubt that she has to

[24] See, for example, Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the statute' of 10 March 2009", ICC-02/04-01/05-408 (OA 3), 16 September 2009, para. 80 which identified that a discretionary decision can be reviewed "(i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion." Also see, Slobodan Milosevic v. Prosecutor, Decision on Interlocutory Appeal of Trial Chamber's Decision on the Assignment of Counsel, Case No. IT-02-54-AR 73.3, 1 November 2004, para. 10 which found that discretionary decision may be reviewed when the decision "'[gave] weight to extraneous or irrelevant considerations, ... failed to give weight or sufficient weight to relevant considerations, or... made an error as to the facts upon which it has exercised its discretion,' or that the [ ] decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly."

[25] See, for example, Prosecutor v Katanga, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings', ICC-01/04-01/07-2259, 12 July 2010, para. 32 stating that discretionary decisions can be reviewed if the "decision is vitiated by a legal error, a factual error or a procedural error, and only if the error materially affected the decision" and "[t]his may require the Appeals Chamber to determine whether the Chamber that rendered the decision under review erred in law, gave undue weight to extraneous factors or failed to consider relevant factors."

[26] AC Judgment, para. 94 (emphasis added).

rectify each error of law and fact (and show that is actually done) in reaching her decision.

18. The assessment of 'weight' and the 'margin of appreciation' (however these are defined) cannot be used as a guise to leave the errors of law and fact unaddressed. The Appeals Chamber's decision should not be distorted to try to justify the OTP's failure squarely to address the errors identified by the Pre-Trial Chamber.

19. The Comoros is thus not trying to rewrite Appeals Chamber's decision. On the contrary, it is urging that this decision and the decisions of the Pre-Trial Chamber are respected and upheld by the Prosecutor.

20. There are so many examples in the Prosecution's Response where the OTP merely repeats the same errors again in reaching the final decision. For example, there is the evidence that the IDF concealed and destroyed electronic media and CCTV – evidence consistent with the existence of a plan or policy to attack the Flotilla and hide that fact which would elevate the gravity of the crimes committed. In its decision of 16 July 2015, the Pre-Trial Chamber found that the Prosecution committed an error by not recognising that this was one of the reasonable alternative explanations of the available information, especially since she relied on the absence of a plan or policy to conclude that the gravity requirement was not met.[27] In its Reconsideration Decision of December 2019, the Prosecution states that it has followed the Pre-Trial Chamber's standard of review by acknowledging that the evidence is "relevant in considering the existence of a plan or policy" as one plausible explanation, but then assigns this evidence no weight based on the other explanation that the evidence is "equally consistent" with covering up spontaneous criminal acts.[28] Here the Prosecution has clearly just adopted one explanation of the evidence in its assignment of 'weight' and its conclusion to the exclusion of another, in flagrant disregard of the ruling of the

[27] PTC First Decision requesting Reconsideration, para. 41.
[28] See, Final decision of the Prosecutor concerning the 'Article 53(1) Report' (ICC-01/13-06-AnxA), dated 6 November 2014, as revised and refiled in accordance with the Pre-Trial Chamber's request of 15 November 2018 and the Appeals Chamber's judgment of 2 September 2019, ICC-01/13-99-Anx1, 2 December 2019, para. 87 [*hereinafter* "OTP Second Reconsideration Decision"]. In para. 87, the Prosecution states that "This information was relevant in considering the existence of a plan or policy. However, it was equally consistent with efforts to cover up planned or spontaneous criminal acts, *and this is relevant to the weight assigned to it.*" (emphasis added).

Chamber.[29] The same has occurred in respect of the evidence of the use of live fire, as set out in the Application for Judicial Review[30] and below, and regarding many other key findings that have a direct bearing on the gravity assessment. This has allowed the OTP to arrive at the same final decision by superficially accepting that versions and explanations of the evidence may exist which might increase the gravity of the crimes without actually applying the correct legal standard to this evidence.

21. While the Appeals Chamber rightly recognised that even after genuinely correcting all of the errors, "it is possible that … the Prosecutor may still arrive at the same conclusion as before"[31], the Appeals Chamber certainly did not intend the OTP's 'margin of appreciation' to mean that plausible interpretations and explanations of the evidence that show gravity can in reality be brushed aside, contrary to the proper application of the legal standard under Article 53.

22. Nowhere does the Comoros suggest that the "Pre-Trial Chamber should declare that it can oblige the Prosecutor to adopt specific factual conclusions, or otherwise substitute its own view for that of the Prosecutor" as the Prosecution has suggested.[32] It is the errors that the Prosecutor must correct, and then a new decision must be reached on the basis of these corrections. The Prosecutor has failed to do so. The Comoros reiterates that the Prosecutor cannot be permitted to reconsider her decision "in a perfunctory manner such that the authenticity of the exercise could be questioned."[33] The final decision itself must be based on findings and reasons that are error free and which are not irrational. Otherwise the decision is unlawful, as the latest OTP decision remains in the present Situation.

[29] Prosecution Consolidated Response, para. 19.
[30] See, Comoros Judicial Review, para. 117.
[31] AC Judgment, para. 79.
[32] Prosecution Consolidated Response, note 77.
[33] AC Judgment, para. 77.

III. ERRORS IN THE PROSECUTION'S ANALYSIS

23. The Prosecutor claims that the Chamber should "approach the Comoros' arguments with caution."[34] There is no merit at all in this assertion. The examples given by the OTP are manifestly inaccurate, misleading and inappropriate, and should all be rejected.

i. The Prosecutor's response regarding evidence of a plan or policy

24. The Government of the Comoros has consistently submitted that there is reliable evidence which is "plainly consistent with a deliberate intent and plan to attack and kill unarmed civilians"[35] that was implemented and commanded from the highest levels. And this is very important as it has a considerable impact on the severity and gravity of the crimes, and from where they were allegedly ordered and overseen which similarly is highly relevant to the gravity assessment.

25. In the OTP's Consolidated Response, it is submitted that the "Prosecutor revised her previous position to accept the fact of a possible plan or policy on the basis of the use of live ammunition before the presence of IDF troops on the Mavi Marmara."[36] In the footnote to this passage, the Prosecution clarifies that it actually means that it has revised its position to accept a possible plan or policy on the basis of the use of live ammunition after the first (failed) attempt at boarding,[37] which the Comoros raised as a error in its Application for Judicial Review.[38] The Prosecution states that "it is commonly accepted that there was no live fire before the (unsuccessful) first attempt at boarding, which many witnesses agree was attempted by surprise" and that the "point in dispute for the past few years has been whether live fire was then employed prior to the (successful) *second* attempt at boarding."[39]

[34] Prosecution Consolidated Response, para. 16.
[35] Comoros First Judicial Review Application, para. 101.
[36] Prosecution Consolidated Response, para. 18.
[37] Prosecution Consolidated Response, note 42.
[38] Comoros Judicial Review, para. 85.
[39] Prosecution Consolidated Response, note 42.

26. The OTP is here blatantly selecting and interpreting the facts to suit the lowest possible level of severity for the crimes by at every turn diminishing the possibility of a planned and coordinated attack. This is completely unacceptable. It is exactly what the OTP was directed not to do by the Pre-Trial Chamber.

27. The Pre-Trial Chamber found that the Prosecutor had erred by disregarding evidence of live fire *prior to boarding*, and recognised that this information is "material to the determination of whether there was a prior intent and plan to attack and kill unarmed civilians."[40] It was precisely in respect of this evidence that the Pre-Trial Chamber found that "*the availability of contradicting information should not mean that one version should be preferred over another*."[41]

28. Having now finally accepted in its latest decision that the available evidence could be consistent with a plan or policy to attack civilians (even if there may be other alternative versions of the events), the OTP was obliged by the applicable legal standard under Article 53 to take that factor into account in the gravity assessment. The OTP did the exact opposite – it gave it no weight on the basis of alternative versions and interpretations of the evidence, as highlighted again in its Response.

29. In other words, the OTP committed the same error again in addressing the very error that it was instructed to correct by the Chamber. This occurred in several ways including:

- There is evidence that the OTP has which confirms that there was live firing from the boats that first attacked the Mavi Marmara i.e. during the so-called 'first' boarding attempt[42] – it is just wrong for the OTP to claim that it is undisputed that live fire was only used in the 'second' boarding attempt from the helicopters. There is even evidence that one of the passengers killed on the lower deck was shot with high velocity ammunition from a surrounding boat.[43]

[40] PTC First Decision requesting Reconsideration, para. 34.
[41] PTC First Decision requesting Reconsideration, para. 36.
[42] See, for example, Victim Observations pursuant to "Decision on Victims' Participation" of 24 April 2015, ICC-01/13-28-Red, 22 June 2015, para. 19.
[43] Application for Judicial Review by the Government of the Union of the Comoros, ICC-01/13-58-Red, 23 February 2018, para. 122 [*hereinafter* "Comoros Second Judicial Review Application"]. See also, Comoros Second Judicial Review Application, Confidential annex 2, paras. 2, 3(iv).

- Instead, the OTP wrongly tries to categorise the two boarding attempts as distinct, and with live fire only being used on the second occasion. The boarding from the sea and the air can (at least) equally be viewed as a single operation to attack the ship in which live fire was used throughout. These are precisely the kinds of factual issues which can only be resolved as part of the investigation. The OTP erred in leaping to one view of the facts (consistent with dismissing the case for a lack of gravity), when there are reasonable alternatives that demonstrate gravity.

- Further, the fact that witnesses said that the Flotilla was attacked by "surprise" is consistent with a well-worked out plan to attack the ships in the most effective way at the right time, and not a spontaneous, uncoordinated event.

- There is in any event ample evidence that live fire was used from the helicopters and directed at civilians before any soldiers boarded, as well as thereafter when civilians were targeted.[44] The OTP erred again in refusing to take this evidence into account as evidence that heightens the gravity of the case, because there was other evidence that may show the opposite. The Chamber has specifically directed the OTP not to make such premature conclusions at this early stage of the proceedings. Yet, the Prosecutor has completely overridden this ruling and direction again in its latest decision.

- In a truly staggering conclusion the Prosecution limits the potential reach of the plan and policy, and the command case, by stating that it could exist only "among some members of the IDF, not apparently including personnel at medium or high levels of IDF command who were not participants in the

[44] 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, ICC01/13-3-Red, 29 January 2015, paras. 101-103 [*hereinafter* "Comoros First Judicial Review Application"]. See, in particular, 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 Human Rights Council, A/HRC/15/21, 27 September 2010, para. 114 [*hererinafter* "UNHRC Report"] in which the Fact-Finding Mission "concluded that live ammunition was used from the helicopter onto the top deck prior to the descent of the soldiers."

boarding operation".[45] The OTP has absolutely no basis to decide at this very early stage that the plan or policy was confined to only those who participated in the boarding operation. That would be illogical for a plan not to emanate from those above the soldiers who boarded the Flotilla. Moreover, there is extensive evidence of the plan reaching right up to the highest levels of the chain of command, and as set out below, the Commander of the Israeli Navy was actually present at the scene of the attack.[46] No reasonable prosecutor could in the face of such evidence conclude that the planning and command case was limited only to those who were boarding the ships. Most importantly, it precisely this kind of overly hasty finding by the OTP which the Pre-Trial Chamber found was not permitted under Article 53.

- Similarly, the OTP limits the interference with electronic media and CCTV only to plan "among some but not necessarily all of the IDF troops who carried out the boarding."[47] Once again, there is no basis or reason to try to limit the nature of the plan in this way, at this stage (unless of course to do all possible to reduce the gravity of the case, in error, so that it can be dismissed). A reasonable, plausible explanation of the evidence is that senior leaders and military commanders planned, organised and ordered the IDF soldiers who boarded the ship, either before the attack or during it, to conceal and destroy all adverse evidence. It is precisely these issues which would be the subject of the investigation. As the Pre-Trial Chamber found, such plausible interpretations of the evidence cannot be ignored because they might be "difficult to establish" or "unclear" at this stage, but should instead be investigated "in order to be able to properly assess the relevant facts."[48]

[45] OTP Second Reconsideration Decision, para. 94.
[46] See, for example, Turkel Commission Report, para. 242 which explains that senior leadership provided extensive preparation, training and possible rehearsal of the operation with the IDF forces which were deployed. The Report also explicitly notes at para 242 the deliberate placement of senior commanders at the scene to direct and oversee the operation against the Flotilla, stating "*The placement of senior commanders on scene, including the Commander of the Navy, demonstrated the seriousness with which this incident was viewed by the Israeli military. It also enhanced the situational awareness of the chain of command in order to help ensure timely and effective decision making as the incident unfolded*."
[47] Prosecution Consolidated Response, para. 19 citing OTP Second Reconsideration Decision, para 85.
[48] PTC First Decision requesting Reconsideration, para. 13.

30. The Comoros has raised the importance of each of these crucial issues for the gravity assessment in its previous filings.[49] For example:

- In its first application for judicial review of 29 January 2015 the Comoros submitted that "[t]here is information available to the Prosecutor that the IDF fired live ammunition from the boats and the helicopters *before* the IDF forces boarded the Mavi Marmara, which is plainly consistent with a deliberate intent and plan to attack and kill unarmed civilians"[50] The Government highlighted evidence from victims, submitted to the Prosecution before its November 2014 decision, which demonstrated that there was extensive evidence of live fire at civilian passengers before any soldiers had boarded the Mavi Marmara.[51]

- As highlighted in the Comoros' Second Judicial Review Application of 23 February 2018, the Comoros submitted further evidence to the Prosecution on the use of live fire, including an expert report from an independent military expert. He noted that "On balance, in light of the materials I have reviewed … I consider that firing of live ammunition from a helicopter above occurred immediately prior to, and during the descent or rappelling onto the upper deck by soldiers from helicopters."[52] In addition, a forensic expert report by a leading pathologist from the United Kingdom was also submitted to the Prosecution to demonstrate, among other things, that the forensic evidence examined is "consistent with passengers being shot with live ammunition on the top deck from the helicopters above before any soldiers descended onto the Mavi Marmara."[53] This forensic expert report found, for example, that "It was clear that the injury to Ibrahim Bilgen who was killed on the top deck … occurred before any rope had been lowered down from the helicopter onto the top deck" and "[t]his injury must have occurred by firing from the helicopter as the site and track of the injury was entirely compatible with his described position."[54]

[49] See, Comoros Second Judicial Review Application, paras. 9-10.
[50] Comoros First Judicial Review Application, para. 101.
[51] Comoros First Judicial Review Application, para. 101.
[52] See, Confidential Annex 1 to Comoros Second Judicial Review Application.
[53] See, Comoros Second Judicial Review Application, para. 19 citing Letter from the Legal Team for the Government of the Comoros to the Prosecution, 27 January 2017.
[54] See, Comoros Second Judicial Review Application, Confidential annex 2, para. 3(iv).

31. This is all evidence that could be thoroughly examined as part of the investigation. It is irrational for the Prosecutor at this preliminary stage to conclude in effect that there was no plan or policy to attack civilians (especially given that it was after all a civilian Flotilla and in light of all the available evidence). The OTP has committed the same legal and factual errors in reaching its latest decision, as those identified by the Pre-Trial Chamber.

ii. The Prosecutor's response regarding the potential perpetrators of the crimes

32. The Prosecution claims that it has not committed any error as submitted by the Comoros[55] because it has "accepted that the individuals or groups or persons that are likely to be the object of any investigation of the potential case(s) arising from this situation include those who may bear the greatest responsibility for the identified crimes."[56] However, the OTP limited the object of any investigation to "physical perpetrators" and not senior officials and leaders as potential perpetrators because it believed there was no evidence to support a conclusion that more senior officials in the Israeli Government or Military might be responsible for the crimes.[57]

33. The Comoros submits that this factor[58] has always concerned whether those most responsible might extend to the highest levels of leadership and the Prosecution's ability to investigate these potential perpetrators. It is not a "different question on which the Comoros and the independently represented victims now seem to focus."[59] This factor has been consistently central to the Government's submissions because the evidence of the involvement of potential perpetrators at the highest levels would undoubtedly increase the gravity of the case. As far back as its referral to the Court in 14 May 2013, the Comoros raised that there was evidence that the potential perpetrators were not just IDF personnel, or the physical perpetrators, but also their superiors in the leadership and command hierarchy.[60] In its first application for judicial review in January 2015, the Comoros highlighted that "that senior IDF commanders

[55] Comoros Judicial Review, paras. 37-45.
[56] Prosecution Consolidated Response, para. 20.
[57] OTP Second Reconsideration Decision, para. 42. See also, Prosecution Consolidated Response, para. 20.
[58] PTC First Decision requesting Reconsideration, para. 23.
[59] Prosecution Consolidated Response, para. 20.
[60] Referral on behalf of the Union of the Comoros, 14 May 2013, para. 22.

and Israeli leaders could be investigated for planning, directing and overseeing the attack on the Flotilla."[61]

34. It is untrue for the Prosecution to state that it had no factual information before it to support a conclusion, or even a plausible interpretation of the evidence which must be examined further in an investigation, that senior officials and leaders could be potential perpetrators.[62] Both the Comoros and the Victims have repeatedly referred to the public testimony before the Turkel Commission from senior political and military leaders about their involvement at all levels of the operation, including the planning, coordinating, ordering and command of the operation. This has included evidence, for example, from the Israeli Defence Minister at the time of the attack, Ehud Barak who gave detailed testimony as to his leading role in planning and coordinating the operation against the Flotilla:

> "*As Defense Minister, I bear a comprehensive responsibility for everything that took place in the systems subordinate to me, including the IDF. I take full responsibility as Defense Minister, for the directives of the political echelon, to the military echelon, as they were given also on the subject of the flotilla. As Defense Minister, I bear a comprehensive responsibility for everything that took place in the systems subordinate to me, including the IDF. I take full responsibility as Defense Minister, for the directives of the political echelon, to the military echelon, as they were given also on the subject of the flotilla."*[63]

35. Defence Minister Barak gave evidence about planning meetings he held which were attended by IDF Chief of Defence Intelligence, Amos Yadlin; IDF Chief of General Staff; Gabi Ashkenasi; the Commander of the Navy, Eliezer Marom; the head of the operations branch; the representative of the Foreign Ministry and other officials.[64] The public testimony before the Turkel Commission further includes evidence from Prime Minister, Benjamin Netanyahu about his assignment of senior leadership to oversee the military operation and respond to the Flotilla, and of the IDF Chief of Staff at the time of the attack, Gabi Ashkenazi. The Commission's findings also made clear, as noted below, that the Commander of the Israeli Navy was present at the scene of the attack.

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[61] Comoros First Judicial Review Application, para. 86.
[62] Prosecution Consolidated Response, para. 20.
[63] See, Response of the Victims to the "Application for Judicial Review by the Government of the Comoros" of 2 March 2020, ICC-01/13-108, 4 May 2020, note 69.
[64] The Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission) Session Number Three, On 10.08.2010, p. 35-36.

36. The Turkel Report which included reference to the recorded public testimony of Defense Minister Ehud Barak and Prime Minister Benjamin Netanyahu, stated *inter alia* that:

- "*… on April 22,2010, a discussion was held on the question of the flotilla which is the subject of this report, against the background of intelligence surverys that were prepared, at the weekly meeting that took place at the office of the Minister of Defense with the participation of IDF officers…In an additional meeting that took place on May 6, 2010, the Minister of Defense approved the overall format of the operation, even though he gave instructions that the preparation for the flotilla should be submitted for the approval of the Prime Minister, together with the Minister of Foreign Affairs, and the Minister of Interior.*"[65]

- "*the Prime Minister asked the Minister of Defence to concentrate upon the inter-ministerial preparations and the preparations of all of the parties in the operation, as a result of his expected trip abroad a short time after that meeting*."[66]

- *"The placement of senior commanders on scene, including the Commander of the Navy, demonstrated the seriousness with which this incident was viewed by the Israeli military. It also enhanced the situational awareness of the chain of command in order to help ensure timely and effective decision making as the incident unfolded."*[67]

37. The Prosecution had this Report before November 2014, and it is repeatedly cited throughout the OTP Article 53(1) Report of November 2014.[68] Therefore, for the Prosecution to contend that it had no factual information to support a conclusion that senior officials and leaders could be most responsible for the crimes committed in the face of this evidence, can only mean that the Prosecution has ignored this evidence, and thus committed an error for "disregard[ing] available information other than when that information is manifestly false."[69] As the Pre-Trial Chamber's applicable legal standard makes clear, it would be premature and wrong to choose one conclusion over another at this early stage of the proceedings.

[65] Turkel Commission Report, para. 117.
[66] Turkel Commission Report, para. 117.
[67] Turkel Commission Report, para. 242.
[68] See, for example, OTP Article 53(1) Report, notes 11, 19, 42, 55, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 73, 74, 77, 85, 86, 87, 88, 89, 97.
[69] PTC First Decision requesting Reconsideration, para. 35.

38. As for the Comoros' submissions about the evidence submitted after November 2014, the Pre-Trial Chamber's decision of 16 July 2015 states that the "question at issue" is "the Prosecutor's ability to investigate and prosecute those being the most responsible for the crime", and not whether the Prosecution, at the moment it issued its Article 53(1) Report, had sufficient evidence to believe that senior IDF commanders and Israeli leaders were responsible. As noted above, the OTP certainly had such evidence before it about the most senior leaders and commanders directing and commanding the entire operation in which crimes were committed. Taken together with the information provided to the Prosecution after November 2014, clearly shows that the Prosecution would have the 'ability' to further investigate these individuals during an investigation where the public testimony and other materials submitted after November 2014 could be analysed.[70]

iii. Legal characterisation of certain conduct

39. In its Application for Judicial Review, the Government of the Comoros submitted that the Prosecution erred in deciding that for the purpose of assigning weight to the nature of the crimes in the gravity analysis, it "only accords neutral significance to the *legal* characterisation of the identified conduct, but gives weight instead to the *factual* nature of the identified conduct."[71]

40. The Prosecution has responded that such a separation is not erroneous because the OTP cannot be directed on how to apply the law to the facts.[72] This entirely misses the point. Where there is evidence that shows the commission of torture, which is plainly a very serious crime, this evidence should not be dismissed merely because the evidence might amount to a lesser crime (as the OTP has done). The OTP has flouted the Chamber's legal standard under Article 53 which specifically requires that the OTP should not choose one interpretation of the evidence over another at this stage of the proceedings. This is precisely what the OTP has done in error. The OTP's 'discretion' or the 'margin of appreciation' cannot be used to try to justify this error. This

[70] PTC First Decision requesting Reconsideration, para. 23.
[71] Comoros Judicial Review, para. 62.
[72] Prosecution Consolidated Response, para. 22.

'discretion' and 'margin' can never permit an error of law or fact to be committed or override the Chamber's direction to rectify such errors.

iv. Impact on the Victims

41. In its Application for Judicial Review, the Comoros submits that the Prosecution erred by failing to provide any reasoning to support that it had genuinely reconsidered its decision in respect of the impact on the victims in accordance with the Chamber's decision of 16 July 2015.[73] In its response the OTP claims that it is not required to provide reasoning or an explanation of how it reconsidered its decision. It asserts that the lack of such reasoning "cannot be interpreted as meaning that the Prosecutor disregarded" information on the impact of the crimes on the victims.[74]

42. The Pre-Trial Chamber has clearly instructed that the Prosecution must provide reasons for its decision.[75] In its 16 July 2015 decision, the Pre-Trial Chamber stated that the Prosecution shall "notify the Chamber, the Comoros and the victims who have provided observations of her conclusion *and of the reasons for it*."[76] The Pre-Trial Chamber further found that merely referencing the issue at hand in a different section of its reconsideration decision "does not in itself assure that the matter was properly considered in reaching the relevant conclusion."[77] The Prosecution has therefore erred in not setting out its reasoning within the section on the impact on the victims (not that it provided any reasons on this particular point in any other section of its decision).

43. The Prosecution's reference to its conclusions regarding the "factual nature of the identified crimes and the scale of victimisation"[78] – addressed in other sections of its reconsideration decision – do not assist in providing any reasoning on how the Prosecution reconsidered the impact of the crimes on the victims. Conclusions about

[73] Comoros Judicial Review, para. 67.
[74] Prosecution Consolidated Response, para. 23.
[75] See, Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros', ICC-01/13-68, 15 November 2018, paras 113 [*hereinafter* "PTC Second Decision requesting Reconsideration"] stating that "Considering that rule 105(5) of the Rules concerns the Prosecutor's duty to give reasons for her decision not to investigate, her duty to give reasons under rule 108(3) of the Rules must, necessarily, arise from the reasons provided by the Chamber under rule 108(1) of the Rules."
[76] PTC First Decision requesting Reconsideration, para. 50 (emphasis added).
[77] PTC First Decision requesting Reconsideration, para. 34.
[78] Prosecution Consolidated Response, para. 23. It is noted that the Comoros disputes that Prosecution's conclusions on the factual nature of the identified crimes and the scale of victimisation were "correctly acknowledge."

the nature of the crimes or scale of victimisation do not address the impact on the victims; they are distinct and separate factors. The nature and scale of the crimes suffered, does not cover the wider issue of the impact of these crimes on the victims.

44. Simply put, the Prosecution has failed to provide any reasons to demonstrate that it has genuinely reconsidered its decision in respect of this specific issue in accordance with the Pre-Trial Chamber's decision of 16 July 2015 and corrected the errors identified by the Chamber.

45. In the Prosecution's response on the number of victims participating who were affected by the crimes committed, the Prosecution disputes, and seeks to distinguish, the reference to the gravity analysis in the *Al Hassan* case.[79] The Prosecution contends that the number of victims in the present Situation cannot be compared to the number in the *Al Hassan* case because the crimes "affected the entire population of Timbuktu and its region."[80] The OTP again overlooks the evidence of the broader impact and affect on the residents in Gaza of the crimes in the present Situation, as has been repeatedly highlighted.[81] Despite the Appeals Chamber's finding that the "Prosecutor cannot ignore a request by the pre-trial chamber to take into account certain available information"[82] the Prosecution – in its latest reconsideration decision[83] and again in its Consolidated Response[84] – has refused to take into account information about the wider impact of the crimes.

46. The OTP also asserts that the victims of crimes on the other vessels cannot be taken into account because the crimes committed on those vessels were not comparable to those on the Mavi Marmara. This is a flawed argument. It completely disregards what happened to a number of victims of other vessels during the attack. The Prosecution has already found that crimes under the jurisdiction of the Court were committed on the other vessels including the Rachel Corrie and the Eleftheri Mesogios/Sofia.[85] This included, but is not limited to, evidence of IDF soldiers pushing the face of a

[79] Prosecution Consolidated Response, para. 25.
[80] Prosecution Consolidated Response, para. 25.
[81] See, Comoros Judicial Review, para. 72, 73.
[82] AC Judgment, para. 80.
[83] OTP Second Reconsideration Decision, para. 49.
[84] Prosecution Consolidated Response, para. 32.
[85] OTP Article 53(1) Report, para. 79.

passenger into glass, passengers being shot by rubber bullets including in the face at close range, another passenger being permanently blinded in one eye by a flash grenade, and passengers being severely beaten by IDF soldiers, and unlawfully detained.[86] It is irrational to claim that this victimisation is irrelevant. It is highly relevant to the scale, nature and impact of the crimes, but also very importantly to showing the level of planning and the intention behind the attack (at least as one reasonable explanation even if there may be others). This is inconsistent with the attack being a spontaneous, unplanned eruption of violence by a few low level IDF soldiers (the version the OTP has consistently adopted, prematurely and in violation of the applicable legal standard). These are all factors which clearly heighten the gravity of the crimes, and thus require investigation.

IV. COMPLIANCE WITH THE PRE-TRIAL CHAMBER'S DECISION

47. The Prosecution's reasons for opposing the imposition of sanctions are wholly unconvincing.[87] The Prosecution claims that "there is no basis to suggest that the Prosecutor or any member of the Office has ever refused to comply with a binding decision by the Court in these proceedings".[88] In fact, the Pre-Trial Chamber's second decision requesting reconsideration of 15 November 2018 documents each of the Prosecution's stated refusals to follow the instructions of the Pre-Trial Chamber.[89]

[86] Comoros First Judicial Review Application, paras. 98, 121-122; and Comoros Second Judicial Review Application, para. 96. See also, UNHRC Report, paras. 112-161, 173.
[87] Prosecution Consolidated Response, para. 30.
[88] Prosecution Consolidated Response, para. 30.
[89] PTC Second Decision requesting Reconsideration, paras. 30-32.
Both the Pre-Trial Chamber and Appeals Chamber concluded that the Prosecution failed to comply with a binding decision by the Court. See, in particular, PTC Second Decision requesting Reconsideration, paras. 81, 83, 84, 85, 86, 111, 112, 113, 115, and 119. In para. 81, the Pre-Trial Chamber states that "the situation in which the Chamber finds itself is extraordinary in so far as the Prosecutor's 29 November 2017 Decision explicitly rejects the Chamber's 16 July 2015 Decision, asserting that the Pre-Trial Chamber does not have the power to make 'a binding order' under article 53(3)(a) of the Statute." In para. 83, the Pre-Trial Chamber states the "the text of the 29 November 2017 Decision leaves no doubt as to the Prosecutor's decision to willfully refrain from complying with the 16 July 2015 Decision." In para. 84, the Pre-Trial Chamber finds that "the Prosecutor chose herself not to follow the 16 July 2015 Decision even though she had attempted to bring similar arguments before the Appeals Chamber." In para. 85, the Pre-Trial Chamber states that "the Prosecutor considers that she is empowered to independently determine the appropriate basis for her reconsideration pursuant to article 53(3)(a) of the Statute, namely the arguments raised by the parties in the litigation before the Pre-Trial Chamber, as opposed to the decision of the Chamber." In para. 86, the Pre-Trial Chamber finds that "Prosecutor is, therefore, challenging certain fundamental notions enshrined in the Statute. Her assertions strike at the very heart of the distribution of authority between the Pre-Trial Chamber and the Office of the Prosecutor." In para. 111, the Pre-Trial Chamber states "after deciding not to follow the 16 July 2015 Decision, the Prosecutor reconsidered the 6 November 2014 Decision on the basis of the submissions made by the parties during the litigation before the Pre-Trial Chamber. The Prosecutor,

Most notable is the Prosecution's submission that it "disagrees with, and cannot follow, the reasoning of the" 16 July 2015 decision.[90] The Appeals Chamber also noted the "Prosecutor's incorrect assumption that it was open for her to disagree with the Pre-Trial Chamber's legal interpretation of the standard to be applied by the Prosecutor."[91]

48. The Prosecution has again not reconsidered its decision in accordance with the Pre-Trial Chamber's orders, and it should be directed to do so again for a third time. In these circumstances, the Comoros submits that the Pre-Trial Chamber would be entirely justified in imposing such measures as are necessary to ensure compliance with its decision and to avoid wasting further time and resources.

49. The Prosecution's submission that sanctions would be "procedurally inapplicable" because the Prosecution does not believe that a warning of sanctions was given by the Pre-Trial Chamber is misguided.[92] Such a warning was indeed given by the Chamber. In its second decision requesting reconsideration of 15 November 2018, having found

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thus, claims the authority to disregard a judicial decision and, in its place, to reconsider her decision not to proceed with an investigation on the basis of submissions provided in the context of proceedings to which she herself was a party. Such an approach is evidently unsustainable." In para. 112, the Pre-Trial Chamber concludes that "Besides rejecting the binding effect of the 16 July 2015 Decision, the Prosecutor additionally misconstrues this division of authority by asserting the power to autonomously determine the basis for her reconsideration." In para. 113, the Pre-Trial Chamber finds that "what the Prosecutor is barred from doing and what she has done here, is to set aside the Chamber's decision in order to *exclusively* address the Parties' and participants' submissions." In para. 115, the Pre-Trial Chamber notes that "the Prosecutor, as she freely admits, manifestly disregarded the 16 July 2015 Decision." In para. 119, the Pre-Trial Chamber states that "it took more than two years, after the 6 November 2015 Appeals Chamber decision declaring her appeal inadmissible, for the Prosecutor to issue her 29 November 2017 Decision, which, as set out above, wilfully refrains from complying with the 16 July 2015 Decision."
See also, Appeals Chamber's Judgment, paras. 83, 85, 90. In para. 83, the Appeals Chamber states that "It remains to be determined whether, in the case at hand, the Prosecutor carried out her reconsideration in accordance with the 16 July 2015 Decision. For the reasons that follow, the Appeals Chamber finds that the Prosecutor did not do so." In para. 85, the Appeals Chamber finds that "in various passages of the Prosecutor's 29 November 2017 Decision, the Prosecutor simply expressed her disagreement with the Pre-Trial Chamber's reasoning and/or conclusions." In para. 90, the Appeals Chamber states that "The above-cited paragraphs of the Prosecutor's 29 November 2017 Decision reflect the Prosecutor's incorrect assumption that it was open for her to disagree with the Pre-Trial Chamber's legal interpretation of the standard to be applied by the Prosecutor under article 53(1) of the Statute and the standard of review under article 53(3)(a) of the Statute in circumstances where the 16 July 2015 Decision had become final. In addition, the unfortunate language used by the Prosecutor to express her disagreement demonstrates that she was entirely misinformed as to what was required of her in conducting the requested reconsideration."
[89] PTC Second Decision requesting Reconsideration, paras. 30-32.
[90] OTP First Reconsideration Decision, para. 95.
[91] AC Judgment, para 90. See also, para. 78, 85.
[92] Prosecution Consolidated Response, paras. 30, 32.

that the Chamber's decision of 16 July 2015 was binding on the Prosecution,[93] the Pre-Trial Chamber clearly warned the Prosecution that the Chamber has the power to sanction the Prosecution if it were to again "deliberate[ly] refus[e] to comply with its instructions, on the basis of either article 71 of the Statute and rule 171."[94] The Prosecution has been put on notice that deliberate refusal to reconsider its decision in accordance with the Pre-Trial Chamber's decision warrants sanction.

50. The Prosecution's argument that sanctions by way of levying a fine would be inappropriate and counter-productive, is also without any merit. Considering the amount of time and resources that have been expended by all parties to this litigation over the course of over 5 and a half years, it is hypocritical to claim that a fine which is capped at no more than 2,000 Euro by Rule 171(4) would detrimentally affect the OTP's resources and outweigh the risk of the Prosecution again not genuinely reconsidering its decision in accordance with the Chamber's orders (with the resulting further delays and wasted costs). It is profoundly unfair for the Prosecution to plead a lack of resources now, when it is the party refusing to comply with the Chamber's orders. In any event, any fine imposed by the Chamber could be designated for victim reparations, or in any other appropriate way by the Chamber.

51. As the Trial Chamber in *Lubanga* concluded "Sanctions under article 71 of the Statute are the proper mechanism for a Trial Chamber to maintain control of proceedings when faced with the deliberate refusal of a party to comply with its orders."[95] With regard to the consideration of resources, the Trial Chamber in *Lubanga* noted that sanctions were the most effective and efficient way to ensure compliance and advance the proceedings, stating that sanctions "are the normal and proper means to bring about compliance in the face of refusals to follow the orders of a Chamber."[96]

[93] PTC Second Decision requesting Reconsideration, para. 96.
[94] PTC Second Decision requesting Reconsideration, paras. 102-104.
[95] Prosecutor v Lubanga, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU', ICC-01/04-01/06-2582, 8 October 2010, para. 3.
[96] Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU', ICC-01/04-01/06-2582, 8 October 2010, para. 59.

52. For this reason and in order to advance the proceedings and ensure that the Prosecution genuinely complies with the decision of the Chamber, it is requested that the Chamber should sanction the Prosecution for its repeated failure to comply with the Chamber's directions.

V. CONCLUSION

53. The Prosecution's Consolidated Response merely repeats the same errors again. It highlights the OTP's steadfast refusal to comply with the Court's directions. The errors identified are significant and critical to the gravity assessment. They cannot be left uncorrected, as they have a direct and vital bearing on the ultimate decision about opening an investigation.

54. The Government of the Comoros accordingly submits that its application for judicial review should be granted. The Government respectfully requests the Chamber (i) to direct the Prosecution to reconsider its latest decision not to open an investigation in accordance with the Pre-Trial Chamber's decision of 16 July 2015, and (ii) to impose sanctions for the Prosecution's repeated failure to comply with the Chamber's decision and in order to ensure such compliance in the OTP's next decision.

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London