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**International
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Date: **3 April 2018**

PRE-TRIAL CHAMBER I

Before: Judge Peter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Alapini-Gansou

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

Public Document

**With Confidential *Ex Parte* Annex 1 only available to the OTP and the Legal
Representative for Victims**

**Victims' Response to the Application for Judicial Review by the Government of the
Comoros filed pursuant to the Pre-Trial Chamber's "Decision on the Request for an
Extension of Time" of 2 March 2018**

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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 Victims of the attack on the Gaza Freedom Flotilla who are represented by the Legal Representative for Victims, Rodney Dixon QC, hereby submit their Response to (i) the “Application for Judicial Review by the Government of the Union of the Comoros”¹ that requested the Pre-Trial Chamber to review the Prosecution’s Decisions on Reconsideration and on the New Evidence, and (ii) the “Prosecution’s Response to the Government of the Union of the Comoros’ ‘Application for Judicial Review’ (ICC-01/13-58) (Lack of Jurisdiction)”² in which the OTP applied to the Chamber to dismiss the Application for Judicial Review *in limine* for lack of jurisdiction.

2. These observations are submitted in accordance with the Order of Pre-Trial Chamber I of 2 March 2018 for “any of the other participants [who] wish to respond to the Application” to do so by 3 April 2018.³ The OTP’s request to amend this Order of 2 March so that the proceedings on the merits are stayed, and the parties would only be required to make submissions on the issue of jurisdiction, has not been ruled on by the Chamber, and therefore has not been granted before the 3 April deadline. The governing Order is thus the Chamber’s Order of 2 March 2018 as no subsequent orders have been handed down. The Victims are accordingly submitting this filing in compliance with the Chamber’s Order of 2 March to address all the issues arising in respect of the Application for Judicial Review, including jurisdiction and the merits, and it is equally incumbent on the OTP to file its submissions in respect of *all* these issues by 3 April 2018 as required by the standing Order of the Pre-Trial Chamber.⁴

¹ Application for Judicial Review by the Government of the Union of the Comoros, ICC-01/13-58, 26 February 2018 (hereinafter “Application for Judicial Review”).

² Prosecution’s Response to the Government of the Union of the Comoros’ ‘Application for Judicial Review’ (ICC-01/13-58) (Lack of Jurisdiction), ICC-01/13-61, 13 March 2018 (hereinafter “Prosecution Response on Jurisdiction”).

³ Decision on the Request for an Extension of Time, ICC-01/13-60, 2 March 2018, para. 8.

⁴ The Victims file this submission in accordance with Regulation 38(2) of the Regulations of the Court, the applicable provision for responses, as the Chamber ordered the participants should do if they wished by 3 April 2018. The Victims note that the OTP tries to argue that this provision is inapplicable, but that assertion is entirely based on the fact that the OTP claims that no judicial review proceedings can be brought, and that its actions are beyond any scrutiny, which is the very subject of the present proceedings (see Prosecution Response on Jurisdiction, note 83).

II. Preliminary Issue

3. At the outset, the Victims request that the Chamber should address and decide on the request of the Government of the Comoros that the Chamber that directed the OTP to reconsider its decision not to open an investigation should be the Chamber that decides the present Application. The Victims support this request. Accepting that one of the Judges of that Chamber's term of office has now expired, nevertheless, one of the other Judges of that Chamber, Judge Tarfusser, is still sitting at the ICC and should thus be assigned to the Chamber to consider the matters in the present proceedings which arise only as a result of the errors that the Majority of the Chamber identified. It is significant that Judge Tarfusser was part of the Majority that found in favour of the Prosecutor having to reconsider her decision. The Victims submit that in the interests of fairness and justice, and in order for justice to be seen to be done, the Court should decide that the remaining Judge from the Majority must remain on the Chamber that continues to consider the *same* proceedings, along with the Judge from the Chamber who dissented in finding that no errors were committed.

4. This is especially so as a central issue to be decided is whether the Prosecutor is entitled to dispute the errors identified by the Majority, and not address them, and take a different view on the applicable law and not follow the law ruled on by the Judges; and, whether the OTP is then entitled to be free of any further review by the Judges who so directed. Given that the Prosecutor's position is essentially that she can ignore what the Judges have ruled, it is vital that the Judges who directed the Prosecutor to address the errors committed decide on what subsequent steps may be taken by the Judges. The unanimous view of the Victims has been to question what is the point of the judicial review process if the Prosecutor can simply disregard the Judge's findings under the guise of claiming that she is 'independent' and nothing can interfere with her 'discretion'. The Victims say that these legal terms are in reality being abused by the OTP to side step the clear holdings of the Judges. They submit that the OTP has misrepresented, distorted, or completely ignored their evidence in seeking to dismiss this case, *without even interviewing them*, and that it was only the Majority of the Chamber who were prepared to identify the OTP's errors. That check and balance has been crucial to safeguarding the integrity of the Court, and its credibility, and it should in no circumstances be sacrificed now merely because the OTP claims that its actions should not be subject to any scrutiny. The Victims therefore ask that this important

matter of retaining the Chamber as constituted for the original decision (or as far as is possible) is addressed by the Court before any further steps are taken in the proceedings, and is ruled on as a preliminary issue.

III. Submissions

A. Overview of Victims' submissions and concerns

5. The Legal Representative of the Victims submits this Response on behalf of 378 victims who have been accepted by the Victims Participation and Representation Section (VPRS) to participate in the ICC proceedings. In order to prepare this Response, participating Victims have been contacted to respond to the "Notice of Prosecutor's Final Decision under Rule 108(3)" of 29 November 2017,⁵ the Application for Judicial review,⁶ as well as the Prosecution Response on Jurisdiction,⁷ and to obtain their views and concerns. They have been relied on to prepare these submissions and certain are cited below.
6. The overwhelming response from the Victims was that the Prosecutor should not be permitted to refuse to address the errors in her original decision not to investigate. They urge the Judges to exercise their powers within the confines of the Statute and Rules to ensure that the Prosecutor rectifies these errors. The Victims emphasise that they are not calling on the Judges to decide that the Chamber can direct the Prosecutor to open an investigation. That is her decision alone, but the Statute has explicitly empowered the Judges to guarantee that the Prosecutor acts lawfully, reasonably and fairly in undertaking this process, and is not allowed to pervert or ignore the Victim's evidence in so doing. The Victims have been particularly dismayed by the Prosecutor's attempts to downgrade the seriousness of what happened to them on the Flotilla and to try to limit the Court's jurisdiction over alleged war criminals.

⁵ Notice of Prosecutor's Final Decision under Rule 108(3), ICC-01/13-57, 29 November 2017 (hereinafter "Prosecution Decision on Reconsideration").

⁶ Application for Judicial Review by the Government of the Union of the Comoros, ICC-01/13-58, 26 February 2018.

⁷ Prosecution's Response to the Government of the Union of the Comoros' 'Application for Judicial Review' (ICC-01/13-58) (Lack of Jurisdiction), ICC-01/13-61, 13 March 2018.

7. The Victims note that the Prosecutor attempts to characterise the IDF operation as one in which the IDF were attacked by the Victims, and thus that it may not have been unlawful for the IDF to have responded in the way it did.⁸ The Prosecutor moreover takes the view that there was no plan or policy to attack the Victims as civilians given that they ‘resisted’ and that any crimes committed occurred in a confusing, chaotic melee in which it is (conveniently) difficult now to discern who may be responsible. The Victims challenge the Prosecutor in preferring this view over that of the Victims that they were acting in self-defence to try to save their lives and the lives of all on the ships from being killed with live ammunition being fired from the surrounding boats, helicopters above and heavily armed soldiers on board. The Victims say the OTP’s assessment of the evidence is profoundly unfair and irrational:

- The Prosecutor has never interviewed any of the Victims. They ask how can the OTP find against them without even speaking to them about their accounts.
- The evidence of those Victims on the top deck is resoundingly clear that they were fired on first from surrounding boats and then the helicopters above, as well as when the soldiers boarded. They had no choice but to try to save themselves and the hundreds of passengers below. And yet, the Prosecutor has sought systematically to discredit this evidence as ‘contradictory’ or to be treated with ‘caution’, without taking into account that it would be most surprising if the evidence from different Victims of this violent attack was exactly the same.
- The Prosecutor fails to recognise that aside from those who were being shot at on the top deck, there were hundreds of passengers below, hiding away, in fear of being killed. They were terrorised and then treated appallingly by the soldiers who captured them.
- The Prosecutor also tries to dramatically scale down the excessive and atrocious behaviour of IDF soldiers in executing and harming persons who were wounded, including shooting certain Victims at point blank range. These are unspeakable

⁸ See Prosecution Decision on Reconsideration, para. 93 and note 162.

acts that plainly aggravate the crimes, and which show that this was not an operation in which the IDF acted to ‘defend’ itself.

8. It is also misguided by the OTP then to seek to restrict the review powers of the Judges over these matters, especially when the Prosecutor has disputed the very errors identified by the Judges. The Prosecutor should rather seek to promote transparency and legal certainty through the open and candid examination of the legal processes behind refusing a State referral. If the Prosecutor is correct, as she claims, there should be nothing to be afraid of. And the Prosecutor’s excuse that this could weigh the Court down in endless litigation is unfounded. These are the only judicial review proceedings before the Court concerning a State referral in connection with a very significant case that received immense international attention. As the OTP knows, judicial review proceedings are often repeated in national systems if required, without crippling the judicial branches.
9. The Victims submit that it is perfectly understandable for defence counsel for the IDF to be seeking to narrow the reach of the Court, and to highlight the potential defences and try to diminish the seriousness of the crimes. However, the mandate of the Prosecutor, as had been noted by the Chamber in its Decision requiring reconsideration, is independently and fearlessly to follow the evidence wherever it may lead and in so doing to strive to bring justice to those who have suffered grave abuses.
10. The ‘independence’ and ‘discretion’ that the Prosecutor keeps leaning on should be invoked to investigate the reasonable allegations in the present Situation, and should not be used to prevent the Court and Victims from reviewing the OTP’s attempts to shut down all inquiries. No rational and independent trier of fact could ever find that the allegations of the Victims are so unreasonable that they warrant no investigation at all. Similarly, it is nonsensical to find that the alleged crimes in the present case are not ‘grave’ enough to be investigated, given that the evidence from the Victims is all reasonably consistent with a civilian flotilla being attacked on the high seas by one of the most powerful armed forces in the world that resulted in unlawful killings and executions, multiple gun shot and other injuries, torture and cruel treatment, and civilians being terrorised on mass in their hundreds.

11. The Victims further highlight that this attack has all the hallmarks of the repetitive IDF attacks on civilians in Gaza and elsewhere who challenge the blockade of Gaza, which has been roundly condemned by the international community including the ICRC.⁹ It is mistaken for the Prosecutor to view the raid on the Flotilla as an isolated incident, and out of any context. The Victims' evidence shows that the IDF were out to teach those on the Flotilla a lesson that human rights defenders and humanitarians should not meddle in Israeli affairs. As the Victims stress, there must surely be a reasonable basis to investigate in these circumstances if the Prosecutor has previously decided to prosecute individuals for killing (a similar number of) peacekeepers in Sudan when that attack did not involve the same numbers of victims injured, tortured, and terrorised, and when it did not take place because of a complete blockade of all humanitarian aid to a besieged people.
12. The Victims thus submit that the Judges should review the Prosecutor's repeated errors in her decisions not to investigate. The Victims' arguments on jurisdiction and in respect of these errors are set out below. They find it striking that the OTP has not once mentioned the interests of the Victims in considering the power of the Court to review the OTP's decisions and address the errors in them. The aim of the Victims to ensure accountability coincides with this being an overriding objective of the Court. The Victims submit that these interests must be central to interpreting and implementing the Chamber's powers of review in circumstances in which the Prosecutor has ignored the findings of the Judges. Furthermore, as the Victims have all accentuated, the failure at least to investigate the very serious allegations in this case (and to shut down any inquiry despite the errors committed by the OTP), sends the completely wrong message to the alleged perpetrators that they can get away with it, and undermines any deterrent effect of the ICC's mandate. As a Victim from Canada V213¹⁰, who had guns pointed at his head by the IDF and who witnessed passengers with gunshot wounds to the back and sides of their heads, stated in response: *"The only thing separating us from the chaos of 'might makes right' thinking and the 'law of the jungle', are the hopefully respected (and feared?) international organisations, like the ICC. If the world's citizenry cannot count on the ICC to do the right thing, then*

⁹ See, 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. 38.

¹⁰ In these submissions the Victims will use the numbers assigned to them by the OTP and that were used by the OTP in its Decision on Reconsideration. This will make it possible for the Chamber to follow the references to the Victims in this Decision and then in the present filing. The list of Victim names that correspond to these numbers, as provided by the OTP, is attached hereto as Confidential ex parte Annex 1.

countries and powerful individuals will take the law into their own hands and justice and peace for the weak will be a thing of the past.”

B. The Pre-Trial Chamber has Jurisdiction to Review the Prosecution’s Decision on Reconsideration of its original decision not to open an investigation

13. The Victims oppose the OTP’s request to dismiss the Application for Judicial Review *in limine*. The Chamber has the power to review the decision taken by the Prosecutor to confirm her original decision not to investigate and to refuse to address the errors identified by the Chamber. As set out below, the Chamber can also review the OTP’s decision on the new evidence. The Chamber should thus proceed to review these decisions, and direct the Prosecutor to rectify the errors in both decisions, as identified by the Government of the Comoros and for the reasons as submitted by the Victims below.

The rights and interests of the Victims underpin the imperative for judicial review

14. Even though the power to review arises in light of a State referral, the Victims submit that their rights to have their allegations investigations weigh heavily in favour of the Chamber having jurisdiction to review the OTP’s refusal to investigate. The OTP claims that on the basis of the “triangulat[ion] between the interests of States in referring situations to the Court, the need for a due measure of judicial oversight, and the need for prosecutorial independence”¹¹ no review should be permitted. No mention is made at all of the rights and interests of the Victims. The OTP should certainly have taken these pivotal considerations of those who are the victims of the very crimes under review, into account in making its submissions on the cornerstone question of the powers of the Chamber to scrutinise the Prosecutor’s errors. The Chamber is urged to give due consideration to the rights of Victims in deciding this essential issue.
15. It is well-established as a matter of international law that those who are the victims of serious crimes have a fundamental right to have their allegations genuinely investigated. The European Court of Human Rights, for example, has held that in cases of arbitrary killings and of torture and cruel treatment there is a positive obligation on States to fully

¹¹ Prosecution Response on Jurisdiction, para. 1.

and effectively investigate instances of violations of victims' rights, particularly if perpetrated by agents of the State:

- In the *Case of Mccann and Others v. the United Kingdom*, the Court found that “a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State.”¹²
- In the *Case of Taniş and Others v. Turkey*, the Court held that a State's investigation into a disappearance was “inadequate and, therefore, in breach of the State's procedural obligations to protect the right to life” due to the State's investigating “authorities' reluctance to investigate allegations of misconduct on the part of the security forces and their acceptance of the security forces' denials without verification.”¹³

16. The Office of the UN High Commissioner for Human Rights (OHCHR) has recognised that the “right to the truth about gross human rights violations and serious violations of humanitarian law is an inalienable and autonomous right.”¹⁴ A Report from the OHCHR on the victims' right to the truth stated that it “is closely linked to the State's duty to protect and guarantee human rights and to the State's obligation to conduct effective investigations into gross human rights violations and serious violations of humanitarian law and to guarantee effective remedies and reparation,”¹⁵ and that it is “fundamental to the inherent dignity of the human person.”¹⁶ The OHCHR found that “[i]n cases of gross human rights violations - such as torture, extrajudicial executions and enforced disappearance - serious violations of humanitarian law and other crimes under international law, victims and their

¹² See, European Court of Human Rights, *Case of Mccann and Others v. the United Kingdom*, Application no. 18984/91, Judgment, 27 September 1995, para. 161.

¹³ European Court of Human Rights, *Case of Taniş and Others v. Turkey*, Application no. [65899/01](#), Judgment, 30 November 2005, paras. 207-210.

¹⁴ Report of the Office of the United Nations High Commissioner for Human Rights. Study on the right to the truth, U.N. Doc. E/CN.4/2006/91 of 9 January 2006, para. 55 (hereinafter “OHCHR Report on the Right to Truth”).

¹⁵ OHCHR Report on the Right to Truth, para. 56.

¹⁶ OHCHR Report on the Right to Truth, para. 57.

relatives are entitled to the truth,”¹⁷ and this right is so fundamental and inalienable that it “should not be subject to limitations.”¹⁸

17. The importance of investigating instances of serious international crimes has been endorsed by the UN Security Council which emphasised the need “to establish the truth, investigate the crimes, and identify and bring to justice those bearing the greatest responsibility for crimes of genocide, crimes against humanity and war crimes committed ... to deter future crimes of this nature, and to bring an end to the climate of impunity.”¹⁹

18. The case law of the Inter-American Court of Human Rights also reinforces the rights of victims to have the violations committed against them investigated:

- In the case of *Blanco Romero et al. v. Venezuela*, the Court found that the victims and, when applicable, their next of kin “have the right, and the States the obligation, to have the events which affected the former effectively investigated by State authorities, to have the suspects of such offenses prosecuted and, where it the case, to have them punished as fit.”²⁰ The Court made clear that a “State must earnestly take all necessary action to identify, judge and punish all perpetrators.”²¹
- In the case of *Vargas-Areco v. Paraguay*, the Court found that the “non-fulfillment of the duty to investigate and punish [the] said death and the alleged acts of torture” of a victim constituted “a violation to the right to personal integrity enshrined in Article 5(1) of the American Convention.”²²

19. In the present case, however, the Victims have not had their allegations genuinely and effectively investigated by the Israeli authorities. There have been no proceedings in Israel to hold those most responsible to account or to provide any reparations for serious crimes perpetrated against the Victims.²³ Israel has also not provided the ICC with any assistance in the present Situation, and has effectively boycotted the Court. Were the Court to

¹⁷ OHCHR Report on the Right to Truth, para. 58.

¹⁸ OHCHR Report on the Right to Truth, para. 60.

¹⁹ See, for example, UN Security Council Res. 1606 (2005) of 20 June 2005.

²⁰ Inter-American Court of Human Rights, Case of Blanco Romero et al. v. Venezuela. Merits, reparations and costs. Judgment of November 28, 2005, para. 96.

²¹ Inter-American Court of Human Rights, Case of Blanco Romero et al. v. Venezuela. Merits, reparations and costs. Judgment of November 28, 2005, para. 97.

²² Inter-American Court of Human Rights, Case of Vargas-Areco v. Paraguay Judgment of September 26, 2006, para. 97.

²³ A few IDF soldiers have only ever been prosecuted for theft of certain belongings of passengers - see The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission, para. 160 (hereinafter “Turkel Report”).

consider today whether the present case was admissible at the ICC on grounds of complementarity, it would undoubtedly find that the case should proceed at the ICC given that Israel's proceedings are wholly insufficient. The Turkel Commission would certainly not satisfy the complementarity requirements of showing that the case was being investigated or prosecuted genuinely.²⁴ Commissions of inquiry are, in general, inadequate. Genuine and concrete official investigations that could lead to prosecutions are required, which has certainly not occurred in Israel. The Turkel Commission was furthermore established by the same Israeli authorities that should be the subject of the investigations, and the Commission has been criticised for lacking independence and covering up for the IDF (something which the OTP has never acknowledged and taken into account).²⁵

20. In addition, the Turkish national courts have prematurely ended the criminal investigation and case there. The majority of the Victims are Turkish nationals and together with all other Victims, they initiated a criminal investigation in Turkey against the IDF commanders who directed the operation. However, on 9 December 2016, the Turkish Criminal Court in Istanbul dismissed the case on account of a political agreement that had been reached between the Governments of Turkey and Israel that required all criminal proceedings in Turkey to be withdrawn.²⁶ In 2015, a Spanish court closed an investigation that had been ongoing for five years as no perpetrator was present in Spain. Significantly, the national prosecutors requested that the judges refer the matter to the ICC.²⁷

²⁴ See, Turkel Report, para. 160.

²⁵ See, Amnesty International Public Statement: Document – Israel / Occupied Palestinian Territories: Israeli Inquiry into Gaza Flotilla Deaths no More than a 'White Wash', 28 January 2011 (<http://www.amnesty.org/en/library/asset/MDE15/013/2011/en/96e848bd-56ee-4e6e-a817-17e07c3d5192/mde150132011en.html>).

²⁶ "Turkish court dismisses case over 2010 Israeli flotilla raid: lawyer", Reuters, 9 December 2016 (<https://www.reuters.com/article/us-turkey-israel/turkish-court-dismisses-case-over-2010-israeli-flotilla-raid-lawyer-idUSKBN13Y25I>).

²⁷ See, Madrid court shelves 2010 Gaza flotilla investigation, Reuters 11 June 2015 (<http://uk.reuters.com/article/2015/06/11/uk-spain-israel-court-idUKKBN0OR2KU20150611>); Spanish court drops investigation on Israeli raid of Gaza-bound flotilla, Daily Sabbah, 11 June 2015 (<http://www.dailysabah.com/mideast/2015/06/11/spanish-court-drops-investigation-on-israeli-raid-of-gaza-bound-flotilla>); Madrid court shelves 2010 Gaza flotilla investigation, Zawya, 11 June 2015 (https://www.zawya.com/story/Madrid_court_shelves_2010_Gaza_flotilla_investigation-TR20150611nL5N0YX4DGX2/); Spain prosecutor requests ICC referral of case against Israel's Netanyahu for 2010 flotilla attack, Electric Intifada, 17 January 2013, (<https://electronicintifada.net/blogs/ali-abunimah/spain-prosecutor-requests-icc-referral-case-against-israels-netanyahu-2010>).

21. As the Court of last resort, which must act when States fail to meet their obligations, and in particular fail to guarantee the rights of victims, the ICC should in the present circumstances accord appropriate weight to the rights of the Victims in the current Situation to have their allegations genuinely investigated. These particular interests must be considered as part of the OTP's suggested 'triangulation' when defining the scope of the Chamber's powers to review the OTP's decisions. This is especially so, given that the OTP takes a stance that fails to uphold the rights of the Victims to a genuine inquiry in light of the errors committed by the OTP. The Chamber is thus urged to give proper recognition to the rights of the Victims, which in the present case would be entirely consistent with reviewing the OTP's decisions to refuse to investigate the alleged crimes.
22. If the Application for Judicial Review were to be dismissed *in limine*, the result would be a complete denial of the Victim's rights to an effective investigation. It would frustrate the core principle of complementarity and render meaningless the Court's mandate to "*put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*"²⁸.
23. The Victims are unanimous in imploring the Judges not to close this case given the errors that have been committed and repeated by the OTP, and remain unaddressed:
- V278: "*This is our last chance. The valid points raised by the Judges have still not been addressed by the Prosecutor. I feel most distressed by the lack of will by the Prosecutor to take our case forward. I ask myself, surely justice should be paramount? Otherwise, I cannot have faith in justice anymore. The perpetrators are free to believe that they can kill civilians with complete impunity. It is a bitterly hollow feeling to think that there may never ever be any accountability for what happened to us.*"
 - V203: "*The Judges are our only hope in this case. I would like the Judges to look at the actual evidence and point out to the Prosecutor that her response does not address the evidence. She has also not considered our concerns about the impact of this attack on us and internationally. Many of us are hopeless about this situation*

²⁸ Rome Statute, Preamble.

and do not have faith that we will get anywhere, but we must keep trying to get justice and hope the ICC will do what is was established for. If cases such as this are not investigated it serves to perpetuate a culture of impunity and ultimately undermines the authority of the Court and international justice generally for ordinary people.”

- V79: *“I want those who murdered civilians to be investigated and there is no other court available apart from the ICC where I can claim my rights and demand justice.”*
- V197: *“The soldiers senselessly opened fire on those wounded and laying on the ground. I will never accept the non-prosecution and non-punishment of those people, who made such cruelty to us although we have told them repeatedly that we were civilians and defenceless and asked for help. What kind of a law is this, where is the justice in it? Where are we going to seek our rights?”*
- W13: *“The ship was a real bloodbath. Is the Prosecutor really saying that it is necessary for everyone to have lost their lives to fulfill the conditions of the gravity principle?”*

24. As noted above, the Victims do not submit that the Chamber can itself decide to open an investigation, even though the OTP tries to suggest this is what is being requested. The OTP distorts and exaggerates the position in the name of preserving its ‘independence’ in order to try to get the Chamber to refuse to take any further action. No one is challenging the OTP’s ‘independence’. The Victims yearn for an independent prosecutor to investigate the IDF. The Victims only submit that in exercising her discretion independently, the Prosecutor must act lawfully, reasonably and fairly, and when she fails to do so, the Judges can review her conduct in order to identify any errors of law and fact that should be rectified. As is highlighted in the Application for Judicial Review, the “Chamber cannot order the Prosecutor to investigate”, but during the process of reconsideration, the Prosecution is required to genuinely “address the errors in her reasoning process”.²⁹

²⁹ See, Application for Judicial Review, para. 35.

25. This power is well accepted the world over as being within the purview of the judiciary to scrutinise the actions of prosecutors. It is not limited to a single review - that would be highly unusual and artificial - it is a procedure that can be repeated where necessary and in order to ensure that identifiable errors are addressed in the interests of justice and the integrity of the proceedings. It can be repeated too to address new errors. Otherwise the procedure would be rendered pointless if the prosecuting authority could on being directed to reconsider its decision, merely repeat the same decision (or another decision with fresh errors) to avoid having to address the legal errors found by the judiciary. As has been recognised in respect of the ICC the Prosecutor must “appl[y] ... her mind” to the errors identified by the Pre-Trial Chamber as well as the Chamber’s interpretation of the law.³⁰
26. Indeed, the Prosecution has itself set out the test for when a decision of the Prosecution can be reviewed, stating that the Pre-Trial Chamber can “*intervene if the Prosecution misinterpreted the law, breached a principle of natural justice, or was unfair; if it took irrelevant information into account in reaching its decision, or failed to take account of relevant information; or if it reached a factual conclusion which was so unreasonable that no reasonable person with the same information could have made it.*”³¹
27. This is exactly what the Victims submit has occurred in the present case: the Prosecutor has misinterpreted the law on when to open an investigation; breached a principle of natural justice and acted unfairly in disregarding the evidence of the Victims in favour of that of the IDF; failed to take account of relevant information that clearly shows the gravity of the case; and reached factual conclusions about the lack of gravity which were so unreasonable that no reasonable person with the same information could have made these findings. There is accordingly no basis for finding that the Chamber lacks jurisdiction to review the very errors that arise within the spheres over which the Chamber can exercise judicial oversight, as conceded by the OTP.

The wording of Rule 108 is no barrier to the Judges’ powers of judicial review

³⁰ See, Application for Judicial Review, para. 32 and Decision on the admissibility of the Prosecutor’s appeal against the ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’, ICC-01/13-51, 6 November 2015, note 134 citing the opinion of M. Bergsmo and P. Kruger, “Article 53: Initiation of an investigation”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck et al., 2nd ed., 2008), p. 1065, at p. 1075: “[Article 53 (3) (a) of the Statute].

³¹ Prosecution Decision on Reconsideration, para. 63.

28. The OTP instead tries to limit the Chamber's powers and places great emphasis on the wording of Rule 108, and particularly the word 'final' in subsection 3, to argue that the procedure is at an end as soon as the OTP decides a second time not to open an investigation. There is no dispute that it is the OTP's final decision whether to open an investigation or not but that does not mean that the Judges are precluded from reviewing that decision when it is taken unlawfully.
29. The OTP indeed concedes that a 'final' decision taken pursuant to a reconsideration process that by the wording of Rule 108(3) could only be handed down pursuant to this Rule, need not be final. The OTP acknowledges that when reconsidering a decision pursuant to a request under Rule 108(2), if, upon reconsideration, the Prosecution decides that there was sufficient gravity to initiate an investigation, but that an assessment on complementarity or the interests of justice still prevented the opening of an investigation, the Pre-Trial Chamber *could* review the Prosecution's decision on reconsideration.³² The wording of Rule 108 makes absolutely no distinction between the different reasons the OTP could rely on to reach its 'final' decision following a request from the Chamber to review its decision. Once the Chamber has requested reconsideration under Article 53(3)(a) the OTP is bound by Rule 108 to report its decision on whether to open an investigation back to Chamber under Rule 108 irrespective of what it decides. Accordingly, if Rule 108 is no barrier for the judicial review of decisions not to investigate based on new grounds then equally it is no barrier for decisions based on similar grounds.
30. It is illogical for the Prosecution to claim that its decision is pursuant to Rule 108 if it still decides not to open an investigation on the same grounds, but somehow is made pursuant to Rule 105 if the OTP continues to decide not to open an investigation but on a different basis. Rules 105 and 108 make no provision for such a distinction. This is a very weak argument that the OTP has come up with to try to get around the obvious fact that any decision not to open an investigation whether on the same grounds or alternative grounds is a decision pursuant to both Article 53(1) and Rule 108, and is subject to review under Article 53(3)(a), the express language of which applies to any decision not to proceed with an investigation.

³² See, Prosecution Response on Jurisdiction, para. 27 and note 53.

31. The Prosecution is playing with words to seek to avoid the most logical and reasonable conclusion that if the Prosecution does not genuinely apply its mind to the errors identified in the Pre-Trial Chamber's request for reconsideration, and the Prosecution makes the same errors again (or new errors) in deciding still not to open an investigation, then the Chamber must be authorised to review that decision in exactly the same way as if the OTP made a decision during its reconsideration on different or varied grounds.
32. The Victims take issue with the submissions made in the Prosecution Decision on Reconsideration³³ and in the Prosecution Response on Jurisdiction³⁴ that the Appeals Chamber has handed down a binding precedent in respect of judicial review proceedings to the effect that the Prosecution is "not bound to accept the Pre-Trial Chamber's views on matters of law or fact" and that no further reviews are permitted by the Chamber.³⁵ The Appeals Chamber has never held that the OTP can decide if it should address the errors identified in a ruling on a judicial review, and nor would it, as there would be no point to the review if the OTP was free to simply ignore the decision. Of course, the Prosecutor decides whether to open an investigation, but this is not the same as saying that the Prosecutor can disregard the Chamber's findings.
33. The OTP tries to argue that part of the reason it sought to appeal the Chamber's Decision to Reconsider as an appeal of right was to pre-empt the suggestion that the Chamber's ruling was a binding determination of admissibility.³⁶ This argument makes no sense. The OTP submitted its appeal as of right to seek to overturn the Chamber's decision. It made a mistake in doing so as the Appeals Chamber ruled that the matter did not concern an issue of admissibility and the OTP should thus have sought the leave of the Chamber to appeal, which it had failed to do. The Pre-Trial Chamber's decision was plainly on the clear, express terms of the decision not one which ruled on admissibility and the Chamber did not hold that the OTP was bound to open an investigation on account of its reasoning. The OTP yet again misunderstands the concept of judicial review. The Chamber is not directing the OTP to investigate; it is directing the Chamber to reconsider its decision in light of the

³³ Prosecution Decision on Reconsideration, para. 3.

³⁴ Prosecution Response on Jurisdiction, paras. 28-34.

³⁵ Prosecution Response on Jurisdiction, paras. 28-34.

³⁶ Prosecution Decision on Reconsideration, para. 29.

errors made. It is finding that the OTP acted unlawfully and not in accordance with the law, and must act lawfully. The Prosecutor is not free to say in effect, ‘we don’t care and we will do what we want in any event’.

34. The OTP is trying to make out that it filed the appeal under the wrong provision *deliberately* in order to get the Appeals Chamber to rule that the appeal was inadmissible (and hence that the OTP’s appeal should be dismissed) but in order to get a ruling that the Prosecutor need not follow the decision of the Chamber. This is a preposterous submission and should be rejected. The Appeals Chamber in any event made no such ruling.
35. All that the Appeals Chamber stated in its decision is that the final decision of whether to open an investigation or not is that of the Prosecutor, not the Judges. This is absolutely correct. The final decision is reserved for the Prosecutor. But she must act lawfully in reaching that decision, and thus any errors of law and fact that have been identified by the Judges must be addressed by the Prosecutor in the process of reaching her decision.
36. The pertinent point is that at no stage did the Appeals Chamber consider, let alone, find that no judicial review can be undertaken of the present decisions of the OTP, decisions that were not even taken yet at the time. As set out in the Government of the Comoros’ Application for Judicial Review, the Appeals Chamber “focused solely on the admissibility of the OTP’s appeal as filed under Article 82(1)(a) and whether it should be dismissed *in limine*” and “heard no submissions from the parties on the reviewability of the OTP’s Reconsideration Decision [not yet even taken]”.³⁷
37. The Appeals Chamber has certainly not given the OTP the green light to ignore the errors identified by the Pre-Trial Chamber, or as the OTP might put, ‘consider them but in fact there is no need to do anything about them and a mere confirmation of the original position will suffice’. This would render the whole exercise a waste of time, and as the OTP is concerned about judicial economy, make it completely unnecessary to embark on this process in the first place. It would set a dangerous precedent in this case and for future cases for the Judges (even if there may be disagreement over the specific errors that have been identified in the present case) as *a matter of principle* to permit the Prosecutor to

³⁷ See, Application for Judicial Review, para. 32 and note 43.

disregard the Judges' findings on the applicable law, and the errors of law and fact identified. It would be tantamount to finding that even though the Judges have found the OTP's actions to be unlawful, that unlawfulness can persist and need not be made lawful.

38. The Victims therefore submit that the Chamber should dismiss the OTP's ill-conceived arguments - including that it is not bound by any decision of the Appeals Chamber on point - and it should review the errors committed again by the Prosecution, as well as new errors made. That would both safeguard the lawfulness of the actions of all the organs of the Court and the rights and interests of the Victims in the present case, as well as in future cases.

C. The Pre-Trial Chamber has Jurisdiction to Review the Prosecution's Decision not to open an investigation based on New Evidence submitted

39. The Prosecution also claims that the Chamber has no power to review its decision on the new evidence. The OTP asserts that because it has relied on Article 53(4) to consider the new evidence, this rigidly blocks the application of Article 53(3)(a) under which the Chamber can review decisions not to open investigations. The Prosecution claims that "the Rules impose no requirements at all upon the Prosecutor in exercising her broad discretion under article 53(4)" and therefore "she is free not only to determine if she wishes to undertake an article 53(4) reconsideration but also when, how, and in what form she may do so."³⁸

40. This view is misguided and wrongly assumes that Article 53(4) exists in a vacuum. The only logical interpretation of this provision is that it must be understood and applied in accordance Article 53 as whole. It is not a free-standing provision. It is a sub-provision of Article 53 which sets out the requirements for opening an investigation. It cannot thus be interpreted without reference to Article 53(1). Indeed, what other criteria could the OTP possibly use when exercising its discretion under Article 53(4) other than the requirements of Article 53(1). It is thus disingenuous for the OTP to claim that it can do 'whatever' it wants. The OTP cannot. It is bound by the criteria of Article 53(1). And it is bound to apply them lawfully.

³⁸ Prosecution Response of Jurisdiction, para. 37.

41. The legal standard under Article 53(1) was enshrined by State Parties to provide certainty and transparency to the OTP's determination. It does not evaporate just because the OTP proceeds under subsection 4 in considering new evidence. The terms of Article 53(4) do not include a separate standard applicable only when the OTP exercises its discretion under this provision. The Chamber should thus interpret this provision in its proper context of Article 53 as a whole. In using its discretion the OTP is bound to apply the provisions of Article 53(1) - there is no alternative - and thus the decisions of the OTP are reviewable pursuant to Article 53(3)(a).
42. The Prosecution's arguments confuse two separate concepts, namely that the Prosecution possesses a wide discretion to consider new evidence that is different from the manner in which the Prosecution as a matter of law is required to exercise that discretion. No one disputes that the Prosecution enjoys a broad discretion to decide whether to review new evidence and whether to open an investigation based on this evidence, but that discretion has to be exercised lawfully and free from errors of law and fact. The Chamber is expressly authorised by Article 53(3)(a) to review decisions not to open investigations in order to ensure that the OTP's discretion is exercised lawfully. This is the same role assigned to judges throughout the world to review the actions of national prosecutors and authorities as to their lawfulness. The judges are rightly not entitled to exercise the discretion themselves and make any decisions, but merely to review them in accordance with the criteria that the OTP has itself recognised as being permissible.³⁹
43. Furthermore, at no point in its submission in response to the Application for Judicial Review has the OTP considered the case/s of if it decided to make a decision pursuant to Article 53(4) based on new grounds that had not been previously reviewed (or even if there had never been a prior review). There would be no plausible reason to refuse a review of a decision not to open an investigation merely because the OTP was exercising its discretion under Article 53(4), including if it decided not to investigate based on the interests of justice, as that would deprive the Chamber of its right to review the decision on its own accord. The fact that the OTP does not address this matter is telling. There is no convincing answer. A decision not to investigate on the basis of new evidence is equally

³⁹ Prosecution Decision on Reconsideration, para. 63.

susceptible to review as it too must be taken lawfully and is in essence no different in terms of the applicable criteria than any other decision not to open an investigation.

44. A substantial body of new evidence was submitted to the Prosecution during the reconsideration period. This included the full victim applications and accompanying statements of more than 350 victims, additional statements from victims and witnesses such as the captain and engineer of the Mavi Marmara, and expert reports from a military expert and forensic expert. As submitted by the Comoros and below by the Victims, many of the same errors have been committed by the OTP in its assessment of this new evidence, and new errors have occurred as well. It would create an absurd dichotomy in the treatment of evidence if evidence considered before the Prosecution made a first determination under Article 53(1) is subject to review by the Pre-Trial Chamber, but not the evidence submitted any later. It cannot turn purely on the timing of the availability and submission of the evidence, and must instead depend on if any errors in the process have been committed, whether at the outset or thereafter.

45. The Victims submit that the OTP should not resist the judicial review of these decisions. It promotes legality and transparency. It will not open the floodgates to litigation as the OTP claims. The procedure is only applicable in respect of State referrals. There are no other judicial reviews currently being litigated at the ICC. The important point in any event is that the identified legal errors are corrected. So-called ‘judicial economy’ should never be an excuse to brush aside the Court grappling with the legality of the parties’ actions and providing a remedy.

D. The Prosecution has committed errors of law and fact that must be reviewed by the Chamber

46. The Victims support the grounds for judicial review submitted in the Government of the Comoros’ Application. They have set out below the particular errors that the Chamber should review and request the Chamber to direct the Prosecutor to reconsider her decisions on the basis of these errors. The Victim’s overwhelming concern is that the Prosecutor has repeatedly either ignored their evidence that highlights the gravity of the crimes in order to reach her decision that somehow the crimes are not serious enough to be investigated, or has misrepresented their evidence in such a way as to reduce the gravity of the IDF’s

conduct, once again, to suit the conclusion that the OTP can now close the case once and for all.

47. The Victims wish to highlight the Prosecutor's errors in four key areas that are all vital to the gravity assessment. Had the Prosecutor not committed these errors, she should have upheld the Victim's right to have their allegations investigated: (i) The OTP has overlooked the Victims' evidence that they were attacked and had to defend themselves, including from live fire from the surrounding boats and helicopters above; (ii) The OTP has misrepresented the Victims' evidence on the nature of the killings, injuries and attack by the IDF; (iii) The OTP gives no weight to the evidence of torture and cruel treatment; and, (iv) The OTP has erred in its assessment of the qualitative factors and impact of the crimes.

(i) Evidence that the civilian passengers were attacked and had to defend themselves including from live shooting from the surrounding boats and helicopters

48. A critical finding by the Prosecution is that there was "violent resistance aboard the *Mavi Marmara*".⁴⁰ This is the reason given by the OTP for concluding that there was no plan or policy to attack civilians. Hence, it is central to refusing to investigate the case for lack of gravity. The OTP maintains that this conclusion is based on "undisputed facts" that passengers "resisted the IDF boarding operation, which led to a period of violent confrontation and chaos lasting up to 47 minutes".⁴¹

49. The Victims submit that these "facts" and the conclusions drawn from them are certainly disputed. Their evidence directly contradicts the Prosecutor's findings and the way in which these findings are used by the OTP to conclude that the IDF did not plan to attack civilians, but rather merely responded to the 'violence' of the passengers. The Victims have made clear in their statements⁴² and in further responses to the OTP's recent decisions that the Prosecutor has ignored their evidence and failed to consider the full context of the attack.

⁴⁰ Prosecution Decision on Reconsideration, paras. 90, 91.

⁴¹ Prosecution Decision on Reconsideration, paras. 90, 91.

⁴² Certain of this key evidence was set out in the Letter to the Prosecution of 8 June 2016 (Confidential Annex 3 to the Application for Judicial Review).

50. The events on the top deck were both preceded by the attack from the zodiac boats and then by the approach of the helicopters. These are two vital stages of the attack that the OTP overlooks. Prior to the arrival of the helicopters, the Victims have testified that they were shocked when *first* attacked with live fire (or what they thought was fire live) from the approaching and surrounding zodiac boats. As is evident from the available video footage and photographs those on the zodiac boats were heavily armed. The Victims say that they never expected such an aggressive response, that they panicked, and from that moment on, they expected the worse and thus sought to defend themselves and those on board. It must be taken into account (which the OTP ignores) that there were hundreds of civilians hiding away below the top deck in fear of their lives once they heard the first shots being fired from the zodiacs and then the helicopters.

51. The Victims have made these facts abundantly clear in their evidence, for example:

- *“None of us had anything in our hands and nothing to defend ourselves with. We were defenceless. The zodiac boats were approaching the front of the ship where we were. They were shooting from the zodiacs and throwing hooks.”*⁴³
- *“Everything felt unreal, I realized that this was happening and that I was right there, and there is nowhere to run. I did not know if I would live or die.”*⁴⁴
- *“I was absolutely scared because it is unusual to see zodiacs and boats and helicopters around your ship, so I was so scared. I thought first that they would direct our ship somewhere, I never thought that they would attack a boat with all civilians.”*⁴⁵
- *“I could see that the soldiers all had guns in their hands but I didn’t look at the zodiacs for long because I was in a rush for my life to get inside the ship. ... I was scared to be killed and rushed inside.”*⁴⁶

⁴³ See, Victim Application of V230.

⁴⁴ See, Victim Application of V116.

⁴⁵ See, Victim Application of V208.

⁴⁶ See, Victim Application of V276.

- *“The soldiers on the zodiacs were holding guns and were firing toward the ship. I could not of course say whether these were real bullets they were using but at the time I thought they were real. We were all in fear of our lives.”⁴⁷*
- *“There were about five or six boats I could see on this side of the boat. They were about 20-25 meters away from the Mavi Marmara. There were about five or six soldiers on each zodiac boat, and they looked like robo cops in their outfits and with their gear. They were completely dressed up. I saw the guns they were aiming at us. Ali Haydar told us to get away from the sides of the vessels, and don’t let them shoot us by standing on the side. We could see that they were shooting at us. It was very clear.”⁴⁸*

52. The Prosecutor should also have taken into consideration that given the short time between the arrivals of the helicopters after the zodiacs had approached, the use of helicopters laden with armed soldiers must have been planned before the attack started and as part of the attack. There is no way the helicopters could have arrived so quickly, or spontaneously, unless it was pre-planned. The Victims note that their evidence is supported by the expert military report of (Rt) Colonel Desmond Travers about the nature and full extent of the planned military operation that was deliberately executed in the early hours of the morning to take the Flotilla by surprise.

53. The OTP has irrationally only focused on one segment of what occurred - what happened when soldiers boarded the Mavi Marmara on the top deck from the helicopters - and nothing before and after, and the full context, in order to draw distorted and unreasonable conclusions about the nature of the attack by the IDF. The OTP criticises the Chamber for focusing on isolated pieces of evidence only, yet it is the Prosecutor who has done just that, without giving due weight to all of the evidence and the complete sequence of events as it unfolded from the first attack by the zodiac boats.

54. It must be underlined that at this stage of the proceedings, all that the OTP had to do was determine that there was a reasonable to believe that the IDF attacked civilians unlawfully

⁴⁷ Statement of V284 provided during the site visit of Dr Jerreat to the Mavi Marmara.

⁴⁸ Statement of V343 provided during the site visit of Dr Jerreat to the Mavi Marmara.

and that the case was thus serious enough to investigate. No final conclusions needed to be drawn about the operation, as this would be for the full investigation to determine. Yet, the OTP acted as no reasonable trier of fact would do, and ignored the evidence of the Victims and all of the relevant circumstances.

55. It is noteworthy that the Prosecutor went so far as to challenge the Pre-Trial Chamber for “contemplate[ing] what might have constituted necessary or reasonable force”⁴⁹ by stating that even if “*in hindsight* [emphasis given by the OTP], the degree of force used aboard the *Mavi Marmara* might have exceeded the minimum force reasonably required in the circumstances ... this state of affairs is not itself prohibited under the Statute.”⁵⁰ The OTP has thus highlighted the possibility that the force used by the IDF was not unlawful at all. No reasonable person could give emphasis to such an outcome while definitively ruling out on all of the evidence from the Victims that there was no reasonable basis, worth investigating, that the attack was planned and unlawfully aimed at civilians.

56. As noted above, it would be perfectly permissible for defence counsel for the IDF to explore arguments ‘in hindsight’ as is often raised as a defence. The Victims have however found it surprising that the Prosecutor has highlighted such points at the expense of the available evidence, for example, V278 stated: “*As a passenger of the Mavi Marmara my personal feeling is that the prosecution appears to be acting like the defence, disregarding the evidence and rights of the victims, while relying on arguments to minimise the actions of the IDF.*” During a full investigation, which should be opened, all of these matters would be considered to decide whether any charges could be brought to prove any alleged crimes beyond reasonable doubt.

57. The Prosecution similarly adopts the wrong approach in assessing the evidence of live firing from the helicopters. The Prosecutor highlights all the points (none of which are justified on the evidence) to discredit the evidence of the Victims and none in their favour, including that: (i) as lay witnesses they could not tell whether the fire was with live ammunition and even if they could it may not have been directed at them but only fired as warning shots; (ii) they would have been confused by the flash bang grenades which makes

⁴⁹ Prosecution Decision on Reconsideration, para. 92.

⁵⁰ Prosecution Decision on Reconsideration, note 162.

their evidence of shooting from the helicopters unreliable; (iii) because some of them were wounded, they may be mistaken about their evidence (a quite remarkable view to take as a prosecutor and to use it against the Victims to question their evidence); and, (iv) they could be bias against the IDF.⁵¹ All of these unfounded arguments are strung together, out of context, to conclude prematurely that all this evidence must be treated with great caution, even though none of it has actually been investigated by the OTP.

58. The OTP has patently disregarded the clear evidence of the Victims about being shot at from the helicopters, when the helicopters first arrived before any soldiers were on the top deck, and thereafter in a sustained and concerted attack on them:

- The Prosecution was specifically directed to the evidence of 19 Victims who stated that they were targeted and shot at from the helicopters above the Mavi Marmara.⁵²
- V343 has stated in response to the Prosecutor's finding that his evidence is unreliable that he is absolutely certain that Mr Bilgen was shot from the helicopter before any soldiers were on board.⁵³ He was there and he can clearly recall these events. He said in response to the OTP's decision that "*Ibrahim Bilgen was definitely shot ... by the soldiers in the helicopter before they came down with ropes ... my testimony is not contradictory*". He also recounted these facts to Dr Peter Jerreat when he conducted his site visit as is recorded in Dr Jerreat's expert medical report.⁵⁴ He again reiterated that he has been and is available to the Prosecutor to be interviewed about these events, and that it is unfair to criticise his evidence without having even spoken to him. He explained that he expected the Prosecutor to assist him and that she would wish to inquire into the traumatic events he suffered, that have changed his life forever, and not to be the one who challenged him and disbelieved his evidence (without even interviewing him).
- Dr Jerreat's expert medical report, from an independent expert, corroborates V343's account in light of the available forensic evidence, including autopsy reports

⁵¹ See Prosecution Decision on Reconsideration, paras 112-119, and 122.

⁵² Letter to the Prosecution of 8 June 2016 (Confidential Annex 3 to the Application for Judicial Review).

⁵³ Prosecution Decision on Reconsideration, Confidential Annex D, para. 42.

⁵⁴ See, Expert Report of Dr Jerreat, Application for Judicial Review, Confidential Annex 2, para. 3(iv).

and physical evidence gathered from the ship.⁵⁵ Dr Jerreat had also made himself available to explain his findings to the OTP.

- All of this evidence is also further corroborated by the military expert report that concluded on all of the available evidence that shooting from the helicopters occurred before and during the soldiers descent onto the ship.⁵⁶
- In addition, the Prosecution had before it the findings of an independent UN report that “*concluded that live ammunition was used from the helicopter onto the top deck prior to the descent of the soldiers.*”⁵⁷ This report was prepared on the basis of the UN’s own investigation in which military and forensic expertise would have been drawn on. At this initial stage of the proceedings, it is wholly unreasonable for the Prosecutor to have departed from these findings in order to refuse to look into the matter any further.
- Similarly, V132 has confirmed in response to the OTP’s decision⁵⁸ that he clearly recalls seeing Furkan Dogan being shot from the helicopters above. Furkan was right next to him, and was filming the helicopter: “*Everything happened all of a sudden, a soldier kept on opening fire from the door of the helicopter and I saw that Furkan was shot in the head*”. His evidence is corroborated by the forensic findings of Dr Jerreat⁵⁹ and the evidence of other witnesses who have again confirmed in response to the OTP’s decision that they witnessed Furkan Dogan being shot from the helicopters.⁶⁰
- V132 too has been available to the OTP to be interviewed if there were any matters that the Prosecution needed to clarify. Instead, his evidence has been challenged by the OTP without being investigated. The OTP’s analysis of the killing of Furkan

⁵⁵ Expert Report of Dr Jerreat, Application for Judicial Review, Confidential Annex 2.

⁵⁶ Expert Military Report, Application for Judicial Review, Confidential Annex 1, para. 43.

⁵⁷ 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 (hereinafter “UNHRC Report”).

⁵⁸ See, Prosecution Decision on Reconsideration, Confidential Annex D, paras 57-69.

⁵⁹ Expert Report of Dr Jerreat, Application for Judicial Review, Confidential Annex 2, para. 3(iv).

⁶⁰ For example, V80 who states that he was 2-3 metres away from Furkan Dogan when he was struck by a bullet in the head as the helicopters fired on them from above.

Dogan is not clear at all and appears to confuse the evidence of those who first saw him being shot from the helicopters and those who later saw him on the floor being shot at point blank range and kicked by the IDF soldiers.⁶¹ These are two separate incidents and the witnesses should not be criticised for having witnessed different events at different times. Once again, these are matters that could readily be clarified, if that was even required, in an investigation. There is clearly sufficient evidence at this stage to find that Mr Dogan was executed in gruesome circumstances, which reveals the extremities of the soldiers' conduct, their real intent, and thus the gravity of the crimes committed.

- Even the OTP had to acknowledge in respect of the killing of Mr Bengi that he may have been shot from the helicopters. Yet, the OTP still seeks to discredit the Victims who gave this evidence, and Dr Jerreat's conclusions, and to highlight (as the OTP repeatedly does) that his death resulted from injuries sustained "in the chaotic resistance on the top deck". All of the OTP's conclusions are unreasonably fixated on this 'resistance', without giving any weight to the clear evidence of the extreme violence deployed by the IDF against unarmed civilians by using live ammunition.⁶²
- Given all of this evidence, taken together, and viewed as a whole, it is perverse for the Prosecutor to have ruled out conclusively that firing from the helicopters occurred before and during boarding, and even if it had occurred, to find that such conduct would not have heightened the gravity of the crimes committed. As the Victims have said, if firing on unarmed civilians from the helicopters does not make the case sufficiently serious, what would?

59. The Victims are concerned that despite all of this evidence, and the Pre-Trial Chamber's finding that it "is material to the determination of whether there was a prior intent and plan to attack and kill unarmed civilians"⁶³, the Prosecution has again dismissed or ignored the evidence and refused to address the errors identified by the Chamber. Furthermore, even

⁶¹ Prosecution Decision on Reconsideration, Confidential Annex D, paras 58-67.

⁶² See, Prosecution Decision on Reconsideration, Confidential Annex D, paras 20-28.

⁶³ 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, para. 34 (hereinafter "Chamber's Decision to Reconsider").

though the Pre-Trial Chamber found that it was an error to disregard evidence that may be contradictory at this stage of the proceedings, the Prosecution has done just that again. The evidence of the Victims and of the IDF (as recorded in the Turkel Commission) is (not unsurprisingly) different, as the IDF deny committing any crimes. This is the reason for needing an investigation. And any differences in the evidence given by the Victims are perfectly understandable in circumstances in which they were being attacked with live ammunition. It would be highly unusual for their evidence all to be identical.

60. The Victims submit that the Chamber should require the Prosecutor to reconsider her decisions in order to address and correct these errors.

(ii) Evidence that civilian passengers were arbitrarily executed and wounded

61. The Victims also wish to highlight the evidence of civilian passengers being executed and wounded after being shot from above and on the deck. The Victims submit that this evidence is important as it undermines the IDF position, and that taken by the OTP, that the IDF were merely responding to the resistance of the passengers. This evidence shows that there is a reasonable basis to believe that the IDF did not act in self-defence but instead deliberately and in a determined fashion sought to kill or harm those who were wounded when there would have been no need to do so had they been acting purely in self-defence. It is revealing of the mindset of the soldiers and thus of the plan to attack and orders they were given. These are matters that any reasonable prosecutor would find it necessary to investigate.

62. The Prosecution has received, and yet ignored, evidence in the form of:

- Autopsy reports that clearly document that the deceased were shot from behind;⁶⁴
- The report of the independent forensic expert, Dr Jerreat, who provided his opinion that the autopsy reports taken together with the evidence demonstrate that passengers were executed;⁶⁵

⁶⁴ 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, ICC-01/13-3-Conf, 29 January 2015, para. 35.

⁶⁵ Expert Report of Dr Jerreat, Application for Judicial Review, Confidential Annex 2.

- The UN Report based on the UN's own investigations and consultations with experts which found that "*the circumstances of the killing of at least six of the passengers were in a manner consistent with an extra-legal, arbitrary and summary execution*",⁶⁶
- Publicly available video evidence in which it is visible that as a wounded passenger is crawling away, he is approached by an IDF soldier and then is no longer moving, consistent with being executed; and,
- The statements and victim applications of several Victims who witnessed the arbitrary executions of their fellow passengers and the severe suffering of those who were wounded.⁶⁷

63. However, the OTP has sought significantly to lessen the gravity of this evidence, even by questioning the extent of the executions and harsh treatment of those who were wounded. For example, the evidence of the execution of Furkan Dogan, an 18 year old US national, is not given any weight by the Prosecutor in her gravity assessment despite the overwhelming evidence of the Victims who witnessed him being shot at point blank range and kicked by IDF soldiers.⁶⁸ V56 has confirmed in response to the OTP's decision that he witnessed Furkan being shot on the ground by the IDF soldiers who kicked his body thereafter: "*What I saw there were people attacking a wounded person with hatred.*"

64. Another example comes from V213 whose evidence the Prosecutor also downplays despite the fact that he has again explained in response the OTP's decision that: "*I walked down the internal stairs to the 3rd deck stairway lounge, where several dead and wounded passengers were being treated. I looked at and photographed several of these people. I saw one man with a bullet hole in the side or back of his head as well as other wounds, and I remember thinking that it looked like an execution shot of a wounded man, but I*

⁶⁶ UNHRC Report, para. 170.

⁶⁷ See Victim Applications and Statements listed in the Letter to the Prosecution of 8 June 2016 and 31 August 2016 within Confidential Annex 3 of the Application for Judicial Review. See also, Letter to the Prosecution of 31 March 2016 within Confidential Annex 3 of the Application for Judicial Review.

⁶⁸ Prosecution Decision on Reconsideration, Confidential Annex D, paras. 50-69. See also, for example, Victim applications of V56, V67, V79, V80, V112, V132, V225, V267, V321, and V343.

immediately discounted that as being too extreme to contemplate. But then I soon saw a second man with a similar wound in the back of his head, with other body wounds, and I realized that these head wounds were quite possibly executions.” The reasonable possibilities that this witness raises, taken together with all of the other evidence, must surely prompt a reasonable prosecutor to investigate these killings.

65. This Victim also reiterated again that *“I was one of the few ‘white’ passengers on the Mavi Marmara, and so was treated much better than the other ‘non white’ passengers, but even so I had IDF soldiers put rifle barrels to my head three times, threatening to shoot me in the head. I suspect that only the colour of my skin and my western nationality saved me from being shot.”* These are yet more aggravating features that reinforce the need for investigation.

66. The Victims ask that the Chamber review the errors committed by the Prosecutor in failing to give appropriate weight to the way in which the killings were perpetrated and the wounded were treated. Any reasonable prosecutor would have regarded the evidence of the Victims on this subject as displaying depraved conduct that was easily serious enough to warrant further investigation.

(iii) Evidence of torture and cruel treatment

67. During the reconsideration period, the Prosecution had before it extensive evidence from the Victims that was relevant to the gravity assessment including in respect of passengers being tortured and seriously mistreated.⁶⁹

68. In its Decision to Reconsider, the Pre-Trial Chamber found that the Prosecution committed an error by not properly taking into account the statements of Victims on the “ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhuman treatment” as a factor of scale contributing to sufficient gravity.⁷⁰ The Chamber also held that the OTP committed an error by prematurely concluding that wide-ranging evidence from the Victims on the pain and suffering they experienced was not

⁶⁹ For example see Letter to the Prosecution of 8 June 2016, Letter to the Prosecution of 31 August 2016, and Letter to the Prosecution of 31 March 2016 within Confidential Annex 3 of the Application for Judicial Review.

⁷⁰ Chamber’s Decision to Reconsider, para. 26.

severe enough to constitute torture or inhumane treatment.⁷¹ The Chamber found that in committing these errors, the Prosecution repeatedly disregarded the evidence submitted by the Victims.

69. Since then the OTP was supplied with quotes from 26 victim statements (as well as the full statements), as a sample, of the severe pain and suffering they endured while being forced into prolonged stress positions for as long as 8-10 hours, which resulted in the Victims fainting and vomiting.⁷² No weight was given to any of this evidence. In addition, the Prosecution was provided with specific references to victims' statements and applications which described passengers being severely beaten and abused after being wounded or handcuffed, as well as wounded passengers being shot, doctors and nurses being targeted and abused while attempting to care for wounded passengers, and Victims being bitten by dogs.⁷³ None of this evidence was given any weight by the Prosecutor.

70. The Victims' response to the OTP's decisions has been again to highlight the widespread instances of torture and cruel and inhumane treatment. They find it inconceivable that a reasonable prosecutor would not wish to inquire into these matters. They request the Chamber to direct the Prosecutor to consider this evidence and genuinely decide whether it heightens the gravity of the case. There is at this stage no requirement for the OTP to draw any firm conclusions, but there is at least a reasonable basis to believe that the pain and suffering endured by many passengers was substantial, thus necessitating further investigation.

(iv) Qualitative features and impact of the crimes

71. The Victims question the Prosecution's conclusions that the Abu Garda case concerning peacekeepers and the Al-Mahdi case concerning the destruction of cultural property are graver than the case concerning the attack on the Flotilla. There is in fact no coherent legal test or standard that the OTP has applied to reach this conclusion. It is distinctly unfair and disrespectful to the Victims to make assertions of gravity in these other cases that in reality could readily be applied to decide that the present case should also be investigated,

⁷¹ Chamber's Decision to Reconsider, paras. 27-30.

⁷² See, Letter to the Prosecution of 31 August 2016.

⁷³ Letter to the Prosecution of 8 June 2016.

particularly given the much increased numbers of civilian victims, the unwarranted cruelty shown to the Victims, the international outcry, and the purpose of the Flotilla being to deliver humanitarian aid to a besieged population.

72. As the Victims explain, they were human rights defenders and should be valued for their role and afforded the protections of the ICC in this capacity; for example, V278 has stated in response to the OTP's decisions: *"What happened to us as humanitarians and human rights defenders took place on the international stage and was witnessed by the world. It was conducted publicly for all the world to see and this makes it more grave. Human rights defenders must be valued and protected by the ICC as they strive to promote everyone's rights and are recognised and protected by the Declaration on Human Rights Defenders 1998 that was adopted by the UN General Assembly."* The Victims emphasise that for the IDF to be allowed to escape any investigation at all in these circumstances has a highly detrimental effect on discouraging further brutality. It sends the totally wrong message to the perpetrators and victims that the crimes will be forgotten. With the blockade of Gaza and conflict ongoing, the Victims say this provides a green light for further atrocities.
73. The Victims submit that the purpose of the attack was to teach them as human defenders a harsh lesson that they should not try again to bring humanitarian aid to Gaza.⁷⁴ It was a grossly disproportionate intimidation tactic that could easily have been avoided if the IDF had not chosen the most aggressive path. The Prosecutor snubbed these submissions, giving no weight at all to these qualitative features of the case and the actual impact it had on the Victims.
74. In so doing the Prosecutor also discounted the impact that the attack on the Flotilla and the impunity that followed had on the citizens of Gaza. The Victims stress that the attack by the IDF on the high seas, indeed shocked the ordinary residents of Gaza. Here were humanitarians, not from Gaza, bringing food and medical supplies to Gaza being murdered for trying to help the impoverished population. No reasonable prosecutor could fail to appreciate the marked impact of the IDF's unlawful conduct on those in dire need of humanitarian assistance in Gaza.

⁷⁴ See, Victim Observations pursuant to "Decision on Victims' Participation" of 24 April 2015, ICC-01/13-28-Red, 22 June 2015, paras. 12, 16, 53. See also, Letter to the Prosecution of 31 March 2016 within the Application for Judicial Review, Confidential Annex 3.

IV. Conclusion

75. The Victims respectfully request the Pre-Trial Chamber to judicially review the Prosecutor's decisions not to open an investigation. The errors that plagued the previous decision persist and there are new errors, which the Chamber should not allow to go unaddressed and uncorrected. The Victims emphasise that the Prosecutor has rejected the Chamber's findings about the errors that were committed and the OTP is proceeding as though it can decide whether to address the errors identified by the Judges. The Prosecutor has in effect proceeded as if there has been no judicial review. Even for the dissenting Judge who took the view that there were no errors in the first place, the Victims submit it cannot be acceptable for the Prosecutor to be the one to decide whether the OTP will abide by a judicial finding or not. Such an approach strikes at the very heart of the proper lawful functioning and integrity of the ICC. Moreover, it cannot be right that the Chamber is now left powerless to say anything further about the OTP's conduct particularly given that it has not applied the Chamber's decision to reconsider.

76. There are compelling reasons, as set out above, to find that the Prosecutor has erred in failing to give weight to the Victims' evidence and all relevant evidence that establishes at least a reasonable basis for the present case being serious enough to warrant the OTP's attention. The Chamber is thus requested to find that the Prosecutor has committed serious errors in refusing to open an investigation, and that the OTP should be directed to reconsider her decisions on all of the evidence, including the new evidence.



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London