

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/13**
Date: **24 April 2015**

PRE-TRIAL CHAMBER I

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

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

Public

Decision on the Victims' Participation

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
 Fatou Bensouda, Prosecutor
 James Stewart, Deputy Prosecutor

Counsel for Defence

Legal Representatives of Victims
 Geoffrey Nice
 Rodney Dixon

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparation**

**The Office of Public Counsel for
 Victims**
 Paolina Massidda

**The Office of Public Counsel for the
 Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
 Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**
 Fiona McKay

Others

PRE-TRIAL CHAMBER I (the “Chamber”) of the International Criminal Court (the “Court or “ICC”) issues the present decision on victims participation in the context of the review proceedings regarding the Prosecutor’s decision not to open an investigation pursuant to article 53(3)(a) of the Rome Statute (the “Statute”).

I. Procedural History

1. On 5 July 2013, the Presidency assigned the situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia involving the Gaza Flotilla incident (the “Situation”) to this Chamber following a referral made under article 13(b) of the Statute by the Union of the Comoros (the “Comoros”).¹
2. On 6 November 2014, the Prosecutor issued a report in which she decided that there is no reasonable basis to proceed with an investigation into the Situation (the “Prosecutor’s Decision”).²
3. On 29 January 2015, the Comoros filed the “Application for Review pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation in the Situation” (the “Application for Review”),³ in which the Comoros request the Chamber to review the Prosecutor’s Decision and to direct the Prosecutor to reconsider that decision.⁴
4. On 19 February 2015, the Registry transmitted to the Chamber a filing by Geoffrey Nice and Rodney Dixon (the “Counsel”), submitted on behalf of KC Law and the IHH Humanitarian Relief Foundation (the “19 February 2015 Request”), in the name of the victims of the alleged crimes committed during

¹ Presidency, Decision Assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I, 5 July 2013, ICC-01/13-1 with two annexes.

² Office of the Prosecutor, *Situation on Registered Vessels of Comoros, Greece, and Cambodia: Article 53(1) Report*, 6 November 2014, ICC-01/13-6-AnxA.

³ ICC-01/13-3-Conf with three confidential annexes. A public redacted version is also available, ICC-01/13-3-Red.

⁴ ICC-01/13-3-Red, para. 142.

the Gaza Flotilla incident (the “485 Victims”). It was purported that the 485 Victims referred to in Annex 2⁵ to the 19 February 2015 Request have allegedly “all filed victim applications with the assistance of the IHH Humanitarian Relief Foundation (IHH) and KC Law, London, to the [Victims Participation and Reparations Section (the “VPRS”)]. Counsel has been instructed to file this Application on behalf of IHH and KC Law, who represent the victims, and have direct contact with them”.⁶ The victim applicants request the Chamber:

- a. To direct VPRS to transmit all victim applications that have been filed by the IHH and KC Law on their behalf to the Chamber without delay so that the victims could be recognised as victims with the right to participate in the present proceedings in accordance with the applicable provisions of the Statute and [Rules of Procedure and Evidence (the “Rules”)], and the jurisprudence of the ICC; and,
- b. To grant the victims the right to participate in the proceedings concerning the Application for Review and to authorise them through their representatives to file their written observations as victims in respect of the Application for Review by no later than 30 April 2015, or a date to be determined by the Chamber.⁷

5. On 13 March 2015, the Prosecutor submitted the “Prosecution Response to the Application Submitted on Behalf of KC Law (London) and IHH Humanitarian Relief Foundation (ICC-01/13-7)” (the “Prosecutor’s Response to the 19 February 2015 Request”) arguing, *inter alia*, that only victims aboard the *Mavi Marmara* vessel should present their views to the Chamber, and that such views shall not be presented by Counsel who is also representing the Government of the Comoros at the same time.⁸

6. On 23 March 2015, the Registry transmitted the 485 Victims request for leave to reply to the Prosecutor’s Response to the 19 February 2015 Request

⁵ ICC-01/13-7-Conf-Anx2.

⁶ ICC-01/13-7-Anx1, para. 2.

⁷ ICC-01/13-7-Anx1, para. 3.

⁸ ICC-01/13-8, paras 2 and 4.

(the “Request for Leave to Reply”),⁹ to which the Prosecutor replied again on 25 March 2015 raising no objections that such leave be granted¹⁰.

II. Applicable Law

7. The Chamber notes articles 19(3), 21(1) and (3), 53(3), and 68(3) of the Statute, rules 59, 85, 90, 92, and 107 of the Rules and regulations 80, 81, and 87(2) of the Regulations of the Court (the “Regulations”).

8. The Chamber notes that victims’ participation in the context of the article 53(3) review proceedings is a mandatory requirement stemming from rule 92(2) of the Rules, which applies irrespective of the grounds on which the Prosecutor bases the decision under article 53(1) of the Statute. In accordance with that rule, the Court shall notify victims who have already communicated with the Court in relation to the situation in question of the Prosecutor’s Decision in order to allow those victims to apply for participation in the proceedings. To this end, the Prosecutor shall, in accordance with regulation 87(2) of the Regulations, “provide all relevant information for notification by the Registry” so that such notification encompasses all victims who have communicated with the different organs of the Court in relation to the situation in question.

9. In the present situation, there is also a second legal basis for victims to participate in the article 53(3)(a) review proceedings. As the Prosecutor has taken her decision referring to “gravity” under article 53(1)(b) in conjunction with article 17(1)(d) of the Statute, rule 107(5) of the Rules stipulates that rule 59 of the Rules applies “[w]here an issue of jurisdiction or admissibility (...) is raised” in the context of an article 53(3)(a) review process. Rule 59(1)(a) of the Rules also obliges the Registrar to inform victims who have already communicated with the Court so as to enable them to address their

⁹ ICC-01/13-11-Anx1.

¹⁰ ICC-01/013-12.

observations to the relevant Chamber in accordance with rule 59(3) of the Rules.

10. The Chamber is of the view that both rules 92(2), and 107(5) together with rule 59 of the Rules, foresee the participation of all victims who have communicated with the Court in relation to the situation in question. Considering that the ground, upon which the 'Prosecutor's Decision rests, concerns "gravity", an issue of admissibility within the meaning of rule 107(5) of the Rules, the Chamber considers rule 59 of the Rules to be *lex specialis* guiding the Chamber in organizing the participation of victims in the present instance. This is without prejudice to any future determination of the Chamber on the merits of the Application for Review.

III. Victims' Participation

1. Victims Entitled to Participate

11. As the Chamber does not consider it necessary that the Registrar takes further measures of publicity, he shall inform those who have (already) communicated with the Court about the present proceedings in conformity with rule 59(1) of the Rules.

12. The Chamber instructs the VPRS to conduct an assessment of all applications of victims who have communicated with the Court with a view to ascertaining whether they fall within the scope of the Situation satisfying the requirements of rule 85 of the Rules. For the purposes of this decision, the Chamber understands the scope of the Situation to be as referred to in the Presidency decision assigning the situation to the Chamber.¹¹ Contrary to the Prosecutor's proposition, a restriction *ab initio* to only those victims aboard the

¹¹ The situation is assigned to a Pre-Trial Chamber on the basis of the Prosecutor's information to the Presidency pursuant to regulation 45 of the Regulations, see Presidency, Decision Assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I, 5 July 2013, ICC-01/13-1-Anx1 and ICC-01/13-1-Anx2.

vessel *Mavi Marmara*, in relation to which the Prosecutor made a positive determination, is not appropriate as the very purpose of the present proceedings is to review the Prosecutor's assessment in relation to the Situation as a whole and not in relation to a certain vessel. Accordingly, the VPRS is authorized to extend its rule 85 assessment¹² to any natural person or organisation or institution¹³ which might have suffered harm as a result of the alleged crimes which occurred on the vessels registered to the Comoros, the Hellenic Republic and the Kingdom of Cambodia within the factual parameters of the referral and who have communicated with the Court. The VPRS is also instructed to verify whether victims are represented by Counsel, any other counsel or whether they are unrepresented. Concluding its assessment, the VPRS is instructed to file a report to the Chamber by Friday, 8 May 2015 indicating which victims communicated with the Court and whether they fell within the parameters of the Situation. The Chamber will later consider the observations of only those victims which, in its assessment, fulfil such requirement.

13. In line with earlier practice, the VPRS is instructed to raise with the Chamber, if need be and on a continuous basis, any issues that may arise in regard to the above processing of the applications.

14. Lastly, the Chamber does not consider it necessary to receive further observations in relation to the status of the victims questioned in the Prosecutor's Response to the 19 February 2015 Request and, accordingly, rejects the Request for Leave to Reply in this regard.

¹² As to the requirements under rule 85 of the Rules, see, among many others, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, 4 March 2015, ICC-02/04-01/15-205, para. 18 with further references in footnote 19. In case information or documentation is further required, the VPRS may revert to the victim concerned and request such information, as appropriate, sufficiently in advance of the submission of its report to the Chamber on Friday, 8 May 2015, see *infra*.

¹³ In addition to the 485 Victims referred to in the 19 February 2015 Request, further victims have submitted an application to the VPRS with a view to participating in these proceedings.

2. Legal Representation

15. Victims are free to choose a legal representative, as confirmed in rule 90(1) of the Rules. The Chamber notes that the group of 485 Victims purport to be represented by Counsel, an appointment which the Prosecutor challenges as Counsel also represent the Government of the Comoros. Having considered the arguments already made on this topic, the Chamber does not consider it necessary to receive further submissions on this matter and, therefore, rejects the Request for Leave to Reply in this regard.

16. Turning to the issue at stake, the Chamber remains unpersuaded by the arguments of the Prosecutor who avers that allowing Counsel to remain the legal representative of victims would “inappropriately provide the [Government of the Comoros], through its representatives, with a further opportunity to reply to the Prosecution’s response”.¹⁴ Other than this procedural argument, no other objection is advanced elucidating a conflict of interest which, in turn, would warrant the intervention of the Chamber. As a result, the Chamber declines to re-assess the choice of the 485 Victims to be represented by Counsel and determines that Counsel may continue their representation, provided they have been given a power of attorney.

17. For all those victims who are unrepresented, the Chamber appoints, in the interest of justice, Paolina Massidda from the Office of Public Counsel for victims (the “OPCV”) as their legal representative for the purposes of the present proceedings. Unrepresented victims will be informed that they shall be represented by the OPCV.

18. The VPRS is instructed to provide the applications or other material of all victims concerned to counsel from the OPCV and to provide him or her

¹⁴ ICC-01/13-8, para. 15.

with any necessary assistance to contact the unrepresented victims expeditiously.

3. Submission of the Victims' Observations

19. The victims entitled to participate are invited to submit their observations in the context of the present proceedings until Friday, 5 June 2015.

20. In order to formulate and submit their observations taking all arguments fully into account, the victims are provided access to all documents contained in the situation record ICC-01/13.

21. The Chamber has taken note of the Prosecutor's proposition that victims "should primarily address the [Prosecutor's Decision] itself and not the litigation between the [Government of the Comoros] and the Prosecution".¹⁵ The Chamber is of the view that victims should be allowed to present any observations deemed relevant to the Chamber's review of the Prosecutor's Decision.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) dismisses** the 19 February 2015 Request;
- b) rejects** the Request for Leave to Reply;
- c) orders** the VPRS to review the applications received by victims who have communicated with the Court with a view to ascertaining whether they fall within the scope of the Situation and to submit a report by no later than **Friday, 8 May 2015** at **16h00** to the Chamber as set out in paragraph 12 of this decision;

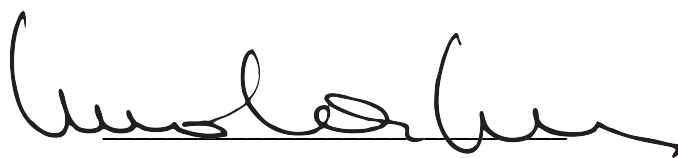
¹⁵ ICC-01/13-8, para. 15.

- d) **appoints** Paolina Massidda from the OPCV to be the legal representative of unrepresented victims for the purposes of the present article 53 proceedings;
- e) **invites** the victims who have communicated with the Court to submit their observations by no later than **Friday, 5 June 2015 at 16h00**.

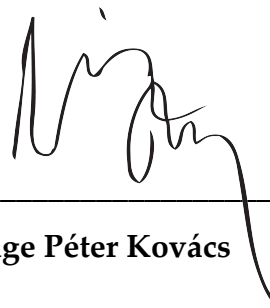
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch
Presiding Judge



Judge Cuno Tarfusser



Judge Péter Kovács

Dated this Friday, 24 April 2015

At The Hague, The Netherlands