

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/13**

Date: **14 February 2019**

**PRE-TRIAL CHAMBER I**

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

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

**Public**

**Decision on the “Application pursuant to Article 119(1) of the Rome  
Statute” and other related requests**

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**

Rodney Dixon  
Paolina Massidda

**Legal Representatives of Applicants**

Nitzana Darshan-Leitner  
Nicholas Kaufman

**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**

Rodney Dixon

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**PRE-TRIAL CHAMBER I** (the “Chamber”) of the International Criminal Court (the “Court or “ICC”) issues the present decision on the “Application pursuant to Article 119(1) of the Rome Statute” (the “Application”),<sup>1</sup> and other related requests.

## **I. PROCEDURAL HISTORY**

1. On 6 November 2014, the Prosecutor decided that there is no reasonable basis to proceed with an investigation into the situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (the “6 November 2014 Decision”).<sup>2</sup>

2. On 29 January 2015, the Comoros submitted 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” asking that the Chamber request the Prosecutor to reconsider her Decision.<sup>3</sup>

3. On 16 July 2015, the Chamber issued the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”.<sup>4</sup> Having found five main errors on the part of the Prosecutor’s assessment of the different facets of the criterion of gravity,<sup>5</sup> the Chamber, by majority, requested the Prosecutor to “reconsider the decision not to initiate an investigation into the situation referred to her by the Union of Comoros” (the “16 July 2015 Reconsideration Decision”).<sup>6</sup>

4. On 29 November 2017, the Chamber received the “Final decision of the Prosecution concerning the ‘Article 53(1) Report’ (ICC-01/13-6-AnxA), dated

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<sup>1</sup> ICC-01/13-82 and its 3 public annexes; ICC-01/13-82-AnxI.

<sup>2</sup> 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.

<sup>3</sup> Pre-Trial Chamber I, ICC-01/13-3-Conf; a public available version is also available, ICC-01/13-3-Red.

<sup>4</sup> Pre-Trial Chamber I, ICC-01/13-34. Judge Péter Kovács issued a partly dissenting opinion, ICC-01/13-34-Anx-Corr.

<sup>5</sup> Pre-Trial Chamber I, ICC-01/13-34, pp. 11-25.

<sup>6</sup> Pre-Trial Chamber I, ICC-01/13-34, p. 26.

6 November 2014”,<sup>7</sup> together with public annexes A-C, E-G and confidential annex D appended to it (the “29 November 2017 Final Decision”).<sup>8</sup> In the latter, the Prosecutor stated that after “[h]aving carefully analysed the [16 July 2015 Reconsideration Decision], the [original report issued by the Prosecutor on 6 November 2014], and the other information available, [...] [she] remains of the view that there is no reasonable basis to proceed with an investigation under article 53(1) of the Statute. As such, an investigation may not be initiated, and the preliminary examination must be closed”.<sup>9</sup>

5. On 23 February 2018, the Government of the Union of Comoros (the “GoC”) filed the “Application for Judicial review by the Government of the Union of the Comoros”, in which it requested the Chamber to “review the two new OTP Decisions not to open an investigation [29 November 2017 Final Decision] and to direct the Prosecutor to reconsider her Decisions in light of the discernable errors in each of them”.<sup>10</sup>

6. On 15 November 2018, the Chamber issued, by majority, the “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’” (the “15 November 2018 Decision”),<sup>11</sup> in which, *inter alia*, it found that the “29 November 2017 decision cannot be considered to be final within the meaning of rule 108(3) of the Rules” and requested the Prosecutor to “reconsider the 6 November 2014 Decision in accordance with the 16 July 2015 Decision” and to notify the “Chamber and those participating in the proceedings of her final decision no later than Wednesday, 15 May 2019”.<sup>12</sup>

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<sup>7</sup> ICC-01/13-57-Anx1.

<sup>8</sup> ICC-01/13-57 and its public annexes A-C, E-G and confidential annex D.

<sup>9</sup> ICC-01/13-57-Anx 1, pp. 4, 7, 143-144.

<sup>10</sup> ICC-01/13-58-Red and its annexes; ICC-01/13-58-Red, pp. 1, 60.

<sup>11</sup> ICC-01/13-68.

<sup>12</sup> ICC-01/13-68, p. 45.

7. On 21 November 2018, the Prosecutor filed the “Request for Leave to Appeal the ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros””,<sup>13</sup> (the “Prosecutor’s Request for Leave to Appeal”) in which, *inter alia*, she sought leave to appeal the 15 November 2018 Decision on the basis of three alleged issues.<sup>14</sup>

8. On 18 January 2019, the Chamber partially granted the Prosecutor’s Request for Leave to Appeal (the “18 January 2019 Leave to Appeal Decision”).<sup>15</sup>

9. On 1 February 2019, the Chamber was notified of a transmission of three documents received by the Registry from Mr. Nicholas Kaufman and Ms. Nitzana Leitner ( the “Applicants”) acting on behalf of the Shurat Ha-Din-Israel Law Centre, an Israeli NGO “which promotes, *inter alia*, public awareness as to the plight of the victims of international terrorism”. The three documents were transmitted in the form of three annexes<sup>16</sup> appended to the Registry’s filing.<sup>17</sup> The relief sought and the legal argumentations in support are included in the Application (Annex I).

10. On 5 February 2019, the Chamber was notified of the “Request to Dismiss *In Limine* an Application under Article 119(1) by *Shurat Ha-Din*”, submitted by the Prosecutor (the “5 February 2019 Application”).<sup>18</sup>

11. On 8 February 2019, the Chamber was notified of a further transmission of two documents from the Applicants.<sup>19</sup> The two documents were also transmitted in the form of two annexes appended to the Registry’s filing. Annex I is a “Request for leave to reply to Prosecution filing: ICC-01/13-83”,<sup>20</sup> while Annex II is a “Provisional

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<sup>13</sup> ICC-01/13-69.

<sup>14</sup> ICC-01/13-69, paras 7-25.

<sup>15</sup> ICC-01/13-73, p. 22.

<sup>16</sup> ICC-01/13-82-AnxI; ICC-01/13-82-AnxII; ICC-01/13-82-AnxIII.

<sup>17</sup> ICC-01/13-82.

<sup>18</sup> ICC-01/13-83.

<sup>19</sup> ICC-01/13-84 and its two public annexes.

<sup>20</sup> ICC-01/13-84-AnxI.

Registration Certificate – Mavi Marmara”.<sup>21</sup> The relief sought by the Applicants is included in Annex I, and calls for the Chamber to “grant leave to reply to the [5 February 2019 Application] [...] or, in the alternative, to accept the observations as an *amicus curiae* submission pursuant to Rule 103 of the Rules of Procedure and Evidence”( the “8 February 2019 Application”).<sup>22</sup>

12. On 12 February 2019, the Chamber received the “Victims’ Request in relation to the Application submitted by the Shurat Ha-din-Israeli Law Centre”, in which the “Principal Counsel [...] requests the Chamber to reject *in limine* the Application, the Request to Reply, and the incidental request to appear as *amicus curiae* contained in the latter, submitted by the Applicant”.<sup>23</sup> According to the Office of Public Counsel for Victims (the “OPCV”), these alternative requests should be dismissed *in limine*, given that the Applicants lack *locus standi* before the Chamber either as a party, participant or an *amicus curiae* in accordance with rule 103 of the Rules of Procedure and Evidence (the “Rules”).<sup>24</sup> Moreover, concurring with the position of the Prosecutor reflected in the 5 February 2019 Application, the OPCV argues that the Applicants misrepresent “a previous decision of the Chamber on a jurisdictional matter issued on 6 September 2018” in relation to the victims’ standing in the proceedings.<sup>25</sup>

13. On 13 February 2019, the Chamber received the “Response on behalf of the Government of the Comoros to the ‘Application pursuant to Article 119(1) of the Statute’ and to the ‘Request for leave to reply to Prosecution filing: ICC-01/13-83’”,<sup>26</sup> in which the GoC requests: “(a) [...] [t]he Application under Article 119(1) should be dismissed *in limine*; (b) [t]he Applicant’s Request for leave to Reply should be similarly rejected; and (c) [t]he Applicant’s new alternative argument about being

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<sup>21</sup> ICC-01/13-84-AnxII.

<sup>22</sup> ICC-01/13-84-AnxI, p. 6.

<sup>23</sup> ICC-01/13-86, p. 5.

<sup>24</sup> ICC-01/13-86, pp. 3-4.

<sup>25</sup> ICC-01/13-86, p. 4.

<sup>26</sup> ICC-01/13-87.

treated as an “*amicus*” should be dismissed *in limine*”.<sup>27</sup> On the same date, the Legal Representatives of Victims ( the “LRV”) filed the “Response on behalf of the Victims to the ‘Application pursuant to Article 119(1) of the Rome Statute’ and to the ‘Request for leave to reply to Prosecution filing: ICC-01/13-83’”,<sup>28</sup> in which the LRV also requests the Chamber to “[d]ismiss *in limine* Shurat Ha-Din’s Application under Article 119(1) for lack of standing; and [d]ismiss *in limine* Shurat Ha-Din’s arguments to make *amicus curiae* observations”.<sup>29</sup>

## II. APPLICABLE LAW

14. The Chamber notes article 21(1)(a) of the Rome Statute ( the “Statute”) and rule 103(1) of the Rules.

## III. THE CHAMBER’S DETERMINATION

15. In the operative part of the Application, the Applicants requests the Chamber to “resolve a dispute concerning its own judicial functions [pursuant to article 119 of the Statute] and to find that it should no longer deliberate on the Mavi Marmara incident within the context of the Comoros Situation”.<sup>30</sup> In this respect, the Applicants consider that in order to reach this conclusion, the Chamber “should deem the Prosecutor’s second decision not to pursue an investigation to be final and not warranting any further reconsideration [...], in light of the information highlighted in [the Application] [...]”.<sup>31</sup>

16. The Applicants also put forward an alternative relief should the Chamber deny the main request namely, “to direct Mr. Rodney Dixon to clarify his mandate to act on behalf of the Government of Comoros (as distinct from Elmadağ Law Firm) and

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<sup>27</sup> ICC-01/13-87, p. 4.

<sup>28</sup> ICC-01/13-88.

<sup>29</sup> ICC-01/13-88, p. 2.

<sup>30</sup> ICC-01/13-82-AnxI, para. 35.

<sup>31</sup> ICC-01/13-82-AnxI, para. 35.

to explain why he believes that no conflict of interest arises as a result of his dual representation".<sup>32</sup>

17. At the outset, the Chamber wishes to point out that the relief sought by the Applicants pertains to the merits, and in order to submit the alternative requests put forward in the Application, the Applicants must first have procedural standing before the Chamber.

18. In this respect, the Applicants claim that they enjoy such a standing on the basis of the Chamber's recent ruling on the "Prosecution's Request for a Ruling on jurisdiction under Article 19(3) of the Statute". According to the Applicants, "the practice of Pre-Trial Chamber I, as it now stands [...] must accord locus standi to any interested party seeking resolution of a dispute concerning the judicial functions of the Court".<sup>33</sup> In supporting their position, the Applicants refer to the "Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'"<sup>34</sup> (the "6 September 2018 Decision"), and assert that the majority of the Chamber "entertained lengthy submissions from the 'Shanti Mohila' victims represented by 'Global Rights Compliance' despite the fact that these victims were never awarded participatory status nor *amicus curiae* status pursuant to Rule 103 of the Rules of Procedure and Evidence".<sup>35</sup>

19. The Chamber does not adhere to the position advanced by the Applicants that "any interested party seeking a resolution of a dispute concerning the judicial functions of the Court" enjoys an automatic right to approach it at all stages of the proceedings without being regulated by the Court's statutory documents. The example of receiving submissions from the victims in the context of the proceedings

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<sup>32</sup> ICC-01/13-82-AnxI, paras 36-37.

<sup>33</sup> ICC-01/13-82-AnxI, para. 15.

<sup>34</sup> Pre-Trial Chamber I, ICC-RoC46(3)-01/18-37.

<sup>35</sup> ICC-01/13-82-AnxI, para. 16.



which led to the 6 September 2018 Decision is inapplicable, and reveals a clear misperception on the part of the Applicants.

20. In paragraph 21 of the 6 September 2018 Decision, the Chamber made it explicitly clear that the “victims have a standing to submit observation pursuant to article 68(3) of the Statute [...] [and] that rule 93 of the rules gives it discretion to accept observations presented by victims on any issue and at any stage of the proceedings, whenever the Chamber finds it appropriate”.<sup>36</sup> In deciding on this matter, the Chamber concluded that the “victims’ personal interests [were] affected by the Request in view of the fact that their applications [were] linked to, *inter alia*, alleged deportations from Myanmar to Bangladesh in august 2017”. The Chamber also added that, “since [the victims’] observations concern the specific legal question arising from the Request, the Chamber finds it appropriate, in these particular circumstances, to hear from the victims at this stage”.<sup>37</sup>

21. It follows that the 6 September 2018 Decision neither established a right for victims’ intervention in the proceedings outside the Court’s legal framework as suggested by the Applicants, nor has it provided for an automatic right of intervention by any interested entity beyond the scope of the Court’s statutory documents. Consequently, the Chamber cannot but dismiss *in limine* the Application in its entirety for lack of *locus standi*. It follows that there is no need to answer to the remaining arguments presented by the Applicants as they pertain to the merits as stated above.

22. Turning to the 8 February 2019 Application, the Chamber recalls that the Applicants advance two alternative requests. With respect to the first request, the Applicants seek leave to reply to the 5 February 2019 Application. Since the Chamber has already ruled that the Applicants have no procedural standing before

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<sup>36</sup> Pre-Trial Chamber I, ICC-RoC46(3)-01/18-37, para. 21.

<sup>37</sup> Pre-Trial Chamber I, ICC-RoC46(3)-01/18-37, para. 21.

this Chamber, this finding equally applies to any subsequent requests put forward by the Applicants namely the request for leave to reply to the 5 February 2019 Application.

23. In relation to the second alternative request namely, “[...] to accept the observations as an amicus curiae submission pursuant to Rule 103 of the Rules of Procedure and Evidence”, the Chamber recalls rule 103(1) of the Rules according to which “[a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a [...] person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate”.

24. The Appeals Chamber has underlined that, when acting within the parameters of rule 103 of the Rules, the respective Chamber should take into consideration whether the proposed submission of observations may assist it “in the proper determination of the case”.<sup>38</sup>

25. In this regard, the Chamber considers that the main subject matter underlying the Applicants’ request has already been decided by the majority of this Chamber in its 15 November 2018 Decision, and that a leave to appeal has been granted by virtue of the 18 January 2019 Leave to Appeal Decision. As such, the matter is currently before the Appeals Chamber. Accordingly, any submission by the Applicants on the subject matter does not fall under the criteria of Rule 103(1) of the Rules, i.e., is not “desirable for the proper determination of the case” at this stage. Thus, the Chamber cannot but reject the second alternative request.

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<sup>38</sup> Appeals Chamber, “Decision on ‘Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence’”, 22 April 2008, ICC-01/04-01/06-1289, para. 8.

26. Finally, in order to avoid unnecessary future litigation on such issues, the Registry is hereby requested to inform the Chamber henceforth of any such filing before it is registered in the situation record.

**FOR THESE REASONS, THE CHAMBER HEREBY**

- a) **DISMISSES** *in limine* the Application in its entirety;
- b) **DISMISSES** *in limine* the first request contained in the 8 February 2019 Application;
- c) **REJECTS** the second request contained in the 8 February 2018 Application; and
- d) **REQUESTS** the Registry to inform the Chamber henceforth of any such filing before it is registered in the situation record.

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



**Judge Péter Kovács**  
**Presiding Judge**



**Judge Marc Perrin de Brichambaut**



**Judge Reine Alapini-Gansou**

Dated this Thursday, 14 February 2019

At The Hague, The Netherlands