

ANNEX 1

PUBLIC

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **17 February 2015**

PRE-TRIAL CHAMBER I

**Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Ekaterina Trendafilova
Judge Christine Van den Wyngaert**

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

Public Document with Confidential Annex 1

**Application Concerning the Participation of Victims in the Review Proceedings
pursuant to Article 53(3)(a)**

**Source: Sir Geoffrey Nice QC and Rodney Dixon QC on behalf of KC Law
(London) and the IHH Humanitarian Relief Foundation who
represent the victims**

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

The Office of the Prosecutor
Ms. Fatou Bensouda, Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr. Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Ms. Fiona McKay

Other

I. INTRODUCTION

1. The victims, as named in this Application, of the attack on the Gaza Freedom Flotilla submit this Application to participate in the proceedings concerning 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’ (“Application for Review”) submitted by the Government of the Comoros on 29 January 2015.¹
2. The victims are identified in Confidential Annex 1 to the Application. They have all filed victim applications with the assistance of the IHH Humanitarian Relief Foundation (IHH) and KC Law, London to the VPRS. Counsel have been instructed to file this Application on behalf of IHH and KC Law who represent the victims and have direct contact with them.
3. The victims respectfully request the Pre-Trial Chamber:
 - a. To direct VPRS to transmit all victim applications that have been filed by 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, 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.

¹ 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-Red, 29 January 2015 (hereinafter “Application for Review”).

4. These requests are made on behalf of the victims pursuant to Article 53(3), Article 68(3), Rule 89(1), Rule 93, Rule 107 and Regulation 87(2).
5. The observations requested in this Application would consist of the views and concerns of the victims that would be assembled by IHH and KC Law to be submitted in a consolidated filing, which would be distinct and different to the submissions made by the Government of the Comoros in its Application.
6. The victims are mindful of the Pre-Trial Chamber's decision of 4 February 2015 which held that "it is appropriate for its review under article 53(3)(a) of the Rome Statute to receive observations from the Prosecutor on the submissions made by the Comoros in the Application."² The Chamber also approved "the proposal of the Prosecutor to set the time limit for the filing of the observations, not exceeding 100 pages, at 30 March 2015" noting the complexity of "the nature of the matter at issue and the scope of the submissions in the Application."³ It is for these same reasons that the victims ask the Chamber to permit them to file their observations within one month after the Prosecution has filed its response i.e. by 30 April 2015.

II. SUBMISSIONS

VPRS to transmit victim applications to the Chamber

7. The first step to be taken without delay is for VPRS to be required to transmit the victim applications to the Chamber for consideration in order to grant the victims the necessary status as victims to participate in the proceedings. Having made inquiries with VPRS, the victims' representatives have been informed by VPRS that it has not yet transmitted any victim applications to the Chamber, even though many of these applications were filed with VPRS over a year and a half ago. The VPRS has stated that it necessary for the

² Decision on the 'Prosecution Request concerning its Response to the Government of the Union of the Comoros' Application under article 53(3)(a) of the Rome Statute, and the applicable time limit', ICC-01/13-5, 4 February 2015, para. 6.

³ Decision on the 'Prosecution Request concerning its Response to the Government of the Union of the Comoros' Application under article 53(3)(a) of the Rome Statute, and the applicable time limit', ICC-01/13-5, 4 February 2015, para. 6.

Chamber to invite VPRS to transmit these applications to the Chamber for consideration. Given that in these circumstances the Chamber has no way of knowing that victim applications have been filed with VPRS, the Chamber is hereby notified of the applications and requested to obtain them from the VPRS.

8. Rule 89(1) provides that *“In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber.”*⁴
9. It is thus surprising that VPRS has as yet not transmitted these applications to the Chamber. Moreover, Rule 92(2) specifically provides that the Court *“shall notify victims concerning the decision of the Prosecutor not to initiate an investigation ... pursuant to article 53”* to *“allow victims to apply for participation in the proceedings in accordance with rule 89”*.⁵ The victims should thus have been notified by the Court of the Prosecutor’s decision not to investigate the situation so that they could apply to participate in the subsequent review proceedings pursuant to Article 53. As far as is known, none of the victims have been so notified.
10. In the circumstances, the victim applications in the present Situation should therefore be urgently transmitted to the Chamber by VPRS so that the victims can participate in the proceedings. In the view of the victims, their applications should already have been transmitted to the Chamber, but as this has yet to be done, the Chamber is requested to obtain these applications immediately from VPRS.

⁴ Rules of Procedure and Evidence, Rule 89(1).

⁵ Rules of Procedure and Evidence, Rule 92(1) and 2 provide: *“(1) This rule on notification to victims and their legal representatives shall apply to all proceedings before the Court, except in proceedings provided for in Part 2. (2) In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question. The Chamber may order the measures outlined in sub-rule 8 if it considers it appropriate in the particular circumstances.”*

Request for victims to submit written observations

11. It is submitted on behalf of the victims that the applicable provisions of the Statute, Rules and Regulations, as well as the jurisprudence of the Court, as set out below, support the victims' right to participate in the proceedings by submitting observations to the Chamber in the review proceedings. The victims were all subjected to the attack on the Flotilla, and should thus be recognised as victims in the Situation and be entitled to participate in the review proceedings.
12. There is a clear statutory basis in support of the victims' right to participate in review proceedings that are filed pursuant to Article 53(3)(a). Rule 93 specifically provides that the Chamber may seek the victim's views on any issue, including those issues referred to Rule 107, which is the rule that deals with review applications filed pursuant to Article 53(3)(a). Rule 93 states that:

“A Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, inter alia, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate.”⁶

13. In addition, as a general rule, Article 68(3) of the Statute provides that:

“Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and

⁶ Rules of Procedure and Evidence, Rule 93 (emphasis added). Rule 107 provides that: “(1) A request under article 53, paragraph 3, for a review of a decision by the Prosecutor not to initiate an investigation or not to prosecute shall be made in writing, and be supported with reasons, within 90 days following the notification given under rule 105 or 106. (2) The Pre-Trial Chamber may request the Prosecutor to transmit the information or documents in his or her possession, or summaries thereof, that the Chamber considers necessary for the conduct of the review. (3) The Pre-Trial Chamber shall take such measures as are necessary under articles 54, 72 and 93 to protect the information and documents referred to in sub-rule 2 and, under article 68, paragraph 5, to protect the safety of witnesses and victims and members of their families. (4) When a State or the Security Council makes a request referred to in sub-rule 1, the Pre-Trial Chamber may seek further observations from them. 5. Where an issue of jurisdiction or admissibility of the case is raised, rule 59 shall apply.”

concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

14. Furthermore, the ICC’s case law provides a clear basis for the victims in the present Situation to be permitted to participate in the review proceedings. The jurisprudence of the Court has clarified that the personal interests of the victims are affected by the Prosecution’s decision under Article 53 whether to open an investigation and to close an existing preliminary examination. In the Situation in the Democratic Republic of the Congo, Pre-Trial Chamber I acknowledged that although “*victims may not be granted a general right to participate at the stage of the investigation in a situation*”, they “*are entitled, however, to participate in any judicial proceeding conducted at this stage, including proceedings affecting investigations.*”⁷

15. The Chamber specifically went on to confirm that:

*“the Statute and the Rules envisage various judicial proceedings that can be conducted at the situation stage: inter alia, **proceedings regarding a review by the Pre-Trial Chamber of a decision by the Prosecutor not to proceed with an investigation or prosecution pursuant to article 53 of the Statute**” and that “Victims can participate in such judicial proceedings if they demonstrate that their interests are affected.”*⁸

16. In another decision, Pre-Trial Chamber I recognised that the interests of victims are affected by an investigation, thereby showing that a decision not to open an investigation would equally affect the victims’ interests. The Pre-Trial Chamber found that “*the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.*”⁹

⁷ Situation in the Democratic Republic of the Cong, Decision on victims' participation in proceedings relating Democratic Republic of the Congo, ICC-01/04-593, 11 April 2011, para. 9.

⁸ Situation in the Democratic Republic of the Cong, Decision on victims' participation in proceedings relating Democratic Republic of the Congo, ICC-01/04-593, 11 April 2011, para. 10 (emphasis added).

⁹ Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101, 17 January 2006, para. 63.

17. Furthermore, as noted above, Rule 92(1) and (2) envisages that the victims are entitled to apply to participate in proceedings that follow the Prosecutor's decision not to initiate an investigation pursuant to Article 53. These provisions show that such a decision does affect the interests of victims. Regulation 87(2) further demonstrates that the Prosecutor's decision on whether to open an investigation affects the interests of the victims, by noting that the Prosecution must inform the victims of its decision. Regulation 87(2) provides that:

“The Prosecutor shall inform the Registry of his or her decision not to initiate an investigation or not to prosecute pursuant to article 53, paragraphs 1 and 2, respectively, and shall provide all relevant information for notification by the Registry to victims in accordance with rule 92, sub-rule 2.”

18. It is the submission of the victims that these provisions and the case law cited confirm that the victims of alleged crimes in a Situation which the Prosecutor has decided not to investigate and which is the subject of a review pursuant to Article 53(3)(a), have a direct interest in the review proceedings. The personal interests of the victims who were the subject of the attack on the Flotilla are directly affected the Prosecutor's decision of 6 November 2014 not to initiate an investigation into the alleged crimes committed against them during the attack and the resulting application to review this decision, as the proceedings plainly concern whether their allegations will be investigated by the ICC so that the perpetrators can be held to account and can be punished.
19. The Situation is one that arises from the crimes allegedly committed against them, and the outcome of the review proceedings will determine whether these crimes could be investigated so that there could be justice for the victims, and the potential to apply for reparations for the harm suffered. The central issue in the review proceedings – the gravity of the crimes – is indeed the gravity of the abuses and suffering that the victims endured.

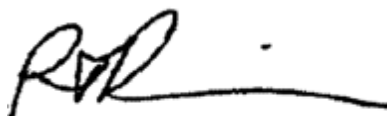
20. Furthermore, the victims ask the Chamber to take account that their statements (including as recorded in their victim applications) were not mentioned at all in the Prosecutor's decision, and there is no reference made to any of their evidence in the Prosecutor's assessment of the gravity of the potential cases. Despite making themselves available to provide evidence to the Prosecutor and "to clarify the facts" (see case law above) so that she could make a fully informed decision about the seriousness of the allegations, none of the victims has been approached by the Prosecutor. One of the key issues in the review proceedings is the fact that the Prosecution has failed to take into account the evidence provided by nearly 500 victims about the alleged unlawful conduct of the Israeli Defence Forces (IDF) in attacking civilians on the Flotilla, including about the killings; the firing of live ammunition before, during and after the IDF boarded the ships; the acts of torture and widespread inhumane treatment; and the discriminatory actions of the soldiers. The crucial issues that are the subject of the litigation in the review proceedings thus directly concern the victims and their personal interests in having their evidence taken into consideration in reaching the very important decision of whether the crimes committed against them will be investigated.
21. Accordingly, the victims request that the Chamber grant them the right to participate in the review proceedings by being permitted to submit consolidated written observations through their representatives to the Chamber.
22. Article 53(3) and Rules 107 and 108 do not set a specific time limit for the submission of observations by the victims. It is requested on behalf of the victims that they be given until 30 April 2015 to file their consolidated observations. This will ensure that they are able to provide their observations in respect of the Review Application and the Prosecutor's Response. It will provide IHH and KC Law with sufficient time to assemble the views and concerns of all the victims who are listed in Annex 1. It should also provide sufficient time for the Chamber to receive and review the victim applications

submitted to VPRS so that the necessary rulings can be made for the victims to participate, if so ordered.

III. CONCLUSION

23. For all of these reasons, the victims respectfully 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 as listed Confidential Annex 1, 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, 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.



Sir Geoffrey Nice QC
Rodney Dixon QC

Counsel instructed by KC Law and IHH Humanitarian Relief Foundation on behalf of the victims

Dated 17 February 2015
London,
United Kingdom