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**International
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PRE-TRIAL CHAMBER I

Before: Judges of Pre-Trial Chamber I

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

Public with Confidential Annex A

**Prosecution Response to the Application Submitted on Behalf of KC Law
(London) and IHH Humanitarian Relief Foundation (ICC-01/13-7)**

Source: Office of the Prosecutor

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
Mr James Stewart

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

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

States Representatives
Mr Geoffrey Nice
Mr Rodney Dixon

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Introduction

1. The Office of the Prosecutor (“Prosecution”) supports the Pre-Trial Chamber receiving the views of relevant victims¹ concerning the Government of the Union of the Comoros’ (“GoCo”) request for review.² However, some of the specific proposals and relief sought in the Application are inapposite, and accordingly the Application should be rejected in part.

Submissions

2. The Pre-Trial Chamber should receive the views of relevant victims, at least being persons aboard the *Mavi Marmara*, or persons otherwise harmed by events aboard the *Mavi Marmara*. For this reason, the Application should be granted in part. However, the Application appears to request that the Pre-Trial Chamber receive the views of some individuals who do not appear to be victims of crimes within the jurisdiction of the Court. The Application also appears to confuse the Pre-Trial Chamber’s potential interest in hearing from victims, and the GoCo’s role in presenting and litigating its Request for Review. In these respects, the Application should be rejected.

3. In considering the Application, the Pre-Trial Chamber should not go beyond the apparent crimes identified by the Prosecution in its report under article 53(1) of the Rome Statute (“Statute”).³

4. If the Pre-Trial Chamber decides to receive the views of relevant victims, the Prosecution recommends that any such views should not be presented by counsel who already represent (or who have represented) the Parties to these proceedings.

¹ ICC-01/13-7 (transmitting as ICC-01/13-7-Anx-1 an “Application submitted by Sir Geoffrey Nice QC and Rodney Dixon QC on behalf of KC Law (London) and the IHH Humanitarian Relief Foundation who represent the victims” (“Application”).

² ICC-01/13-3-Red (“Request for Review”).

³ See ICC-01/13-6-AnxA (“Report”).

The Pre-Trial Chamber should permit the views of relevant victims to be represented

5. Consistent with its view that victims' participation is an essential feature of the Court and its law,⁴ the Prosecution supports the representation of the views of relevant victims in the course of the proceedings relating to the Request for Review under article 53(3)(a) of the Statute and rule 107 of the Rules of Procedure and Evidence ("Rules").⁵ The Prosecution considers that article 68(3) of the Statute, and rules 85, 89, 92(3) and 93, indicate that these proceedings, being "judicial proceedings", may be an appropriate stage for victim participation. Alternatively, the Pre-Trial Chamber may simply solicit the views of relevant victims under rule 93.⁶

6. The Prosecution takes no position on the assertions in the Application concerning the transmission of materials in the possession of the Victims Participation and Reparations Section of the Registry ("VPRS").⁷ The Prosecution does not have independent access to materials submitted to VPRS.⁸ However, the Prosecution notes its view that the preliminary examination itself—which, like an investigation, is not a judicial proceeding⁹—would not have been an appropriate stage in which victims could have participated.¹⁰

⁴ See ICC, Office of the Prosecutor, Policy Paper on Victims' Participation, April 2010, available at <http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/281751/PolicyPaperonVictimsParticipationApril2010.pdf> (accessed 13 March 2015), p.5.

⁵ See Application, paras.11-19.

⁶ ICC-01/04-556 OA4 OA5 OA6 ("DRC Appeal Decision"), para.48. The Appeals Chamber also confirmed that "[t]he views of victims", under this provision, "may be solicited independently of whether they participate or not in any given proceedings before the Court."

⁷ See Application, paras.7-10.

⁸ Cf. Application, para.20. The Prosecution has previously advised the representatives of the GoCo of this fact. See further below para.17.

⁹ Although preliminary examinations and investigations are similar in that they are not judicial proceedings, they are entirely distinct and different functions in other respects. See e.g. Report, para.4; ICC, Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf (accessed 13 March 2015), para.85.

¹⁰ See DRC Appeal Decision, para.45 ("participation can take place only within the context of judicial proceedings [...] a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a

The Pre-Trial Chamber should not hear the views of persons who are not victims of crimes in the Court's jurisdiction

7. The Application is brought on behalf of 485 natural or legal persons ("Applicants"),¹¹ characterised as persons who "were all subjected to the attack on the Flotilla, and [who] should thus be recognised as victims in the Situation and be entitled to participate in the review proceedings."¹² This applies an overly extensive (and incorrect) definition of "victim", whether for the purpose of article 68(3) or rule 93. Although the Prosecution is amenable to the Pre-Trial Chamber receiving the observations of relevant victims, this should not include persons who are not victims of crimes within the jurisdiction of the Court.

8. To be recognised as a "victim" for the purpose of the Statute and the Rules, a person must have suffered harm, directly or indirectly, as a result of a crime within the Court's jurisdiction.¹³ Likewise, there must at least be grounds to believe that the crime was committed within the temporal and geographic parameters of the situation.¹⁴ Any broader definition of victim, not confined to persons directly or indirectly harmed by crimes within the jurisdiction of the Court, would potentially include the entire world within its ambit. Moreover, the Rules already provide an alternative mechanism for other persons or organisations to seek leave to present observations by means of rule 103.

judicial proceeding but an inquiry conducted by the Prosecutor"). *See also* Application, para.14, fn.7 (citing ICC-01/04-593, para.9).

¹¹ *See* ICC-01/13-7-Conf-Anx-2 ("List of Applicants").

¹² Application, para.11. *See also* para.18 ("The personal interests of the victims who were the subject of the attack on the Flotilla are directly affected [by] the Prosecutor's decision of 6 November 2014 not to initiate an investigation into the alleged crimes committed against them during the attack [...] as the proceedings plainly concern whether their allegations will be investigated by the ICC so that the perpetrators can be held to account").

¹³ *See* Rules, rule 85(a) (defining victim "[f]or the purposes of the Statute and the Rules", without limitation). *See further* ICC-01/04-01/06-1432 OA9 OA10, paras.29-33, 38; ICC-01/04-01/06-1813, paras.44-52.

¹⁴ *See e.g.* ICC-01/04-423-Corr, para.4.

9. In determining whether the Applicants are victims of crimes within the Court's jurisdiction, in these proceedings, the Pre-Trial Chamber should consider only the crimes for which the Prosecution identified a reasonable basis in the Report. Taking any further alleged crimes into account would pre-judge the substantive outcome of the Request for Review. Relying on the Report in this fashion occasions no prejudice, and maintains a practicable framework for victim participation.

10. In the Report, the Prosecution determined that there was a reasonable basis to believe war crimes were committed aboard the *Mavi Marmara*.¹⁵ It made no such determination regarding the *Rachel Corrie* (over which the Court has jurisdiction)¹⁶ or the vessels of the flotilla over which the Court does not have jurisdiction. With regard to the *Eleftheri Mesogios* or *Sofia*, the Prosecution made only a conditional determination that a crime may have been committed.¹⁷ The Prosecution's determination in these respects is not effectively challenged in the Request for Review,¹⁸ which primarily disagrees with the Prosecution's gravity analysis and the consequent decision not to open an investigation.

11. Accordingly, the Prosecution considers that persons aboard the *Mavi Marmara*, or persons otherwise harmed as a result of the events aboard the *Mavi Marmara*, may be considered as victims in these proceedings under article 53(3)(a). With respect to persons aboard the *Sofia*, consistent with the conditional determination in the Report, the Prosecution takes no position and leaves the matter to the Pre-Trial Chamber.

¹⁵ See Report, paras.132, 149.

¹⁶ See Report, paras.79-82, 95, 132, 149.

¹⁷ See Report, paras.30, 32-33, 79-82, 96, 132, 149. The Report determined that only if the blockade was unlawful—on which the Report did not take a position—would there be a reasonable basis to believe the attacks *per se* upon the *Sofia*, and the *Mavi Marmara* constituted crimes under article 8(2)(b)(ii) of the Statute. The Prosecution did not find in any event that the conduct of IDF troops aboard the *Sofia* amounted to conduct meeting the threshold of crimes under articles 8(2)(a)(i), 8(2)(a)(iii), or 8(2)(b)(xxi).

¹⁸ *But see* Request for Review, paras.121-122 (asserting generally that “similar crimes occurred on other vessels of the Flotilla”, primarily referring to the *Challenger I*, a vessel outside the Court's jurisdiction).

12. Applying these principles, the Prosecution offers the following specific observations concerning the possible recipients of any invitation from the Pre-Trial Chamber.

- Of the passengers aboard the *Mavi Marmara* (up to approximately 577 in total), the Prosecution determined that there was a reasonable basis to believe that 10 were killed, up to 50-55 were injured, and various others subject to outrages upon personal dignity.¹⁹ Although the Prosecution did not determine that *all* passengers aboard the *Mavi Marmara* were direct victims of crime, the Prosecution will not object to the view of any person aboard the *Mavi Marmara* being represented.
- With respect to the 9 deceased persons listed among the Applicants,²⁰ the Prosecution will not object to those persons' relatives making observations in their own name, on the basis of harm suffered by them indirectly.²¹
- With respect to 55 of the Applicants, and without the benefit of access to materials in the possession of VPRS,²² the Prosecution possesses information which raises doubt as to whether they were affected by the apparent crimes aboard the *Mavi Marmara*.²³ Specifically:

¹⁹ See Report, paras.13, 38-39, 42, 53, 57-61, 64-65, 69, 71-72, 75-77.

²⁰ See List of Applicants, nos.28, 85, 88, 141, 234, 380, 412, 441, 457. One person who died as a result of the events aboard the *Mavi Marmara* appears not to be listed.

²¹ See e.g. ICC-01/04-01/07-1491-Red-tENG, paras.52-56 (deceased persons may not qualify as victims participating in the proceedings).

²² See above fn.8.

²³ The Prosecution's observations in this respect are based on a comparison of the List of Applicants with the materials received in the course of the preliminary examination, including open source materials. The Prosecution does not present these observations as fact, but merely draws potentially conflicting information to the attention of the Pre-Trial Chamber. The information supporting the Prosecution's observations is submitted in the confidential Annex.

- 9 applicants appear to have been passengers aboard the *Sofia*.²⁴ Consistent with the conditional determination in the Report,²⁵ the Prosecution takes no position regarding their status.
- 1 applicant appears to have been a passenger aboard the *Rachel Corrie*.²⁶ Accordingly, although aboard a vessel within the geographic parameters of the Situation, this passenger was not aboard a vessel upon which the Prosecution determined there was a reasonable basis to believe crimes had been committed.
- 44 applicants appear to have been passengers aboard *other* vessels in the flotilla, and hence outside the geographic parameters of the Situation.²⁷ In its Report, the Prosecution did not determine whether crimes may or may not have been committed on these vessels since they fell outside the scope of the Situation.
- 1 applicant, a legal person, may have chartered or owned another vessel in the flotilla, and hence outside the geographic parameters of the Situation.²⁸ In its Report, the Prosecution did not determine whether crimes may or may not have been committed on this vessel since she fell outside the scope of the Situation.

²⁴ See List of Applicants, nos.132, 163, 217, 220, 324, 331, 332, 372, 385.

²⁵ See above fn.17.

²⁶ See List of Applicants, no.270. In this respect, the Prosecution notes that the *Rachel Corrie* was not present at the time of the interception and boarding of the *Mavi Marmara* and other vessels. When the *Rachel Corrie* was subsequently intercepted, the boarding was conducted peacefully. See Report, paras.13, 81, 95.

²⁷ Of these, 15 may have been aboard the Kiribati-registered *Defne* (List of Applicants, nos.39, 68, 105, 119, 146, 148, 174, 188, 210, 245, 257, 263, 268, 287, 322), 14 may have been aboard the Turkey-registered *Gazze I* (List of Applicants, nos.13, 96, 122, 138, 154, 203, 247, 255, 312, 348, 349, 392, 408, 466), 10 may have been aboard the Togo-registered *Sfendoni* (List of Applicants, nos.61, 92, 204, 236, 239, 269, 277, 326, 328, 384), and 5 may have been aboard the USA-registered *Challenger I* (List of Applicants, nos.46, 134, 356, 371, 438).

²⁸ See List of Applicants, no.483. This organisation chartered or owned the USA-registered *Challenger I*. To the extent the organisation owned or held an interest in the cargo aboard the *Elfetheri Mesogios/Sofia*, on the information in the possession of the Prosecution, this cargo was ultimately delivered to its intended recipients in Gaza by the Israeli authorities and does not appear to have been harmed in the process: see Report, paras.119, 141. See further Rules, rule 85(b).

- With respect to 8 applicants, the Prosecution has been unable to match them with the information in its possession concerning passengers aboard the *Mavi Marmara*.²⁹ So long as their legal representatives can confirm to the Pre-Trial Chamber that these individuals were indeed passengers aboard the *Mavi Marmara*, the Prosecution would not object to their participation in these proceedings.
- With respect to 1 applicant, a legal person, the Prosecution is simply unable to determine the basis upon which they may have been involved in the flotilla.³⁰
- Finally, with respect to 3 applicants, the Prosecution observes that they appear to be listed twice.³¹

Any observations filed by the victims should be procedurally distinct from the litigation between the Prosecution and the GoCo

13. It is evident from the Application that the representation of the GoCo and the proposed representation of the victims in these proceedings are presently intertwined. Given these circumstances, the Pre-Trial Chamber should not accept all the proposals contained in the Application for the filing of any observations by the victims.³² Instead, it should invite the filing of any observations taking into account the following considerations.

14. The Application recognises that any observations presented by the victims should be “distinct and different to the submissions made by the [GoCo] in its

²⁹ See List of Applicants, nos.30, 51, 109, 145, 231, 342, 361, 479. A number of persons in respect of whom the Prosecution has information suggesting that they were passengers aboard the *Mavi Marmara* do not appear to be in the List of Applicants.

³⁰ See List of Applicants, no.482.

³¹ See List of Applicants nos.237 and 238 (identical names and country of origin), 266 and 345 (identical country of origin, given name and surnames reversed), 281 and 282 (different countries of origin, but identical names).

³² *Contra* Application, paras.22-23.

[Request for Review].”³³ The Prosecution agrees. Yet this assurance seems empty when the Application states that any observations “would be assembled by IHH and KC Law”.³⁴ Not only is KC Law the law firm presently instructing counsel for the GoCo, but those same counsel are also presently instructed both by the Applicants and the GoCo.³⁵

15. Furthermore, the Application proposes that observations by victims should be presented on the Prosecution’s *response* in these proceedings,³⁶ rather than focusing on the Prosecution’s original determination under article 53(1) and the issues raised by the GoCo in the Request for Review. Taking into account the identity of counsel presently involved, this would inappropriately provide the GoCo, through its representatives, with a further opportunity to reply to the Prosecution’s response. Rather, observations filed by victims should be procedurally distinct from any further submissions which the GoCo may file, for which it should separately seek leave.³⁷ Furthermore, any observations filed by victims should primarily address the Report itself, and not the litigation between the GoCo and the Prosecution.

16. The Prosecution does not object to the Application’s proposal that any observations from the victims are filed by 30 April 2015.

³³ Application, para.5.

³⁴ Application, para.5.

³⁵ See Application, para.2; Request for Review, p.1 (“Source: Sir Geoffrey Nice QC, Rodney Dixon QC, and KC Law (London) on behalf of the Government of the Union of the Comoros”). Mr. Dixon is also apparently instructed in other jurisdictions on behalf of persons aboard ships of the Flotilla: *see The Independent*, ‘British activists launch lawsuit over deadly raid on Gaza ‘peace flotilla’’, 4 January 2015, available at <http://www.independent.co.uk/news/uk/home-news/british-activists-launch-lawsuit-over-deadly-raid-on-gaza-peace-flotilla-9955992.html> (accessed 27 February 2015); Temple Garden Chambers, ‘Rodney Dixon QC’, available at <http://tgchambers.com/barristers/rodney-dixon-qc.aspx> (accessed 27 February 2015) (describing among Mr Dixon’s “notable cases”, “Government of Comoros, 2014, representing the Government of Comoros in respect of its referral to the ICC of the attack on the ‘Gaza Freedom Flotilla’ in May 2010, as well as acting for victims seeking to bring claims in the UK and abroad arising from the attack on the Flotilla”).

³⁶ See Application, paras.6, 22 (requesting to file observations one month after the Prosecution has filed its response so that they may include “observations in respect of the [Request for Review] and the Prosecutor’s Response”).

³⁷ See *e.g.* Regulations of the Court (“Regulations”), regulation 24(5).

Submissions going to the merits of the GoCo's Request for Review should be dismissed in limine

17. Submissions in the Application going to the merits of the Request for Review should be dismissed *in limine*. In particular, paragraph 20 of the Application addresses the Pre-Trial Chamber on the substantive content of the Report and the appropriate procedure for the conduct of preliminary examinations.³⁸ Whereas such submissions may be appropriate in any observations solicited or authorised by the Pre-Trial Chamber, they find no place in a procedural request like the Application. The Prosecution will address these arguments in its response on the merits of the Request for Review.

Conclusion

18. For these reasons, the Application should be accepted in part and dismissed in part.

19. The Pre-Trial Chamber should receive the views of relevant victims, being persons aboard the *Mavi Marmara*, or persons otherwise harmed by those events. Consistent with the conditional determination in the Report, the Prosecution takes no position regarding persons aboard the *Sofia*. Otherwise, the Pre-Trial Chamber should not receive the views of individuals who do not appear to be victims of crimes within the jurisdiction of the Court.

20. Any observations presented by victims should be directed to the Prosecution's Report, rather than being a reply to the Prosecution's response to the GoCo's Request

³⁸ See Application, para.20. The Application expressly characterises the issues about which it makes substantive assertions as being some of the “crucial issues that are the subject of the litigation”. The Pre-Trial Chamber should also exercise similar caution regarding a submission that “the gravity of the abuses and suffering that the victims endured”, while obviously a very significant factor, is necessarily the only or central factor in assessing the gravity of the crimes: see Application, para.19.

for Review. Observations should not be presented by counsel who already represent or who have already represented the Parties to these proceedings.



Fatou Bensouda, Prosecutor

Dated this 13th day of March 2015

At The Hague, The Netherlands