

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **14 July 2015**

PRE-TRIAL CHAMBER I

Before: **Judge Joyce Alouch, Presiding Judge**
 Judge Cuno Tarfusser
 Judge Péter Kovács

**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 A

**Response by the Government of the Comoros to Victim Observations filed on 22
June 2015**

Source: **Sir Geoffrey Nice QC, Rodney Dixon QC, and Stoke & White LLP
(London) on behalf of the Government of the Union of the
Comoros**

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

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Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
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Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Government of the Union of the Comoros (“the Applicant State Party” or “Applicant” in the current Review proceedings) submits this Response to the “Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation”¹ and the “Victim Observations pursuant to ‘Decision on Victims’ Participation’ of 24 April 2015”² both filed on 22 June 2015.
2. This Response is filed pursuant to Regulation 24, 34(b) and 33(1)(b) of the Regulations of the Court,³ and in accordance with the practice and jurisprudence of the Court.⁴ The Government of the Comoros thus files this Response as has been done by the parties in several other cases following the submission of victim observations.
3. The Government has not replied in this filing to the Prosecutor’s Response to the Review Application⁵, and again asks the Chamber to grant leave for the Applicant to reply to the Prosecutor’s Response, as has been requested in the Government’s application of 9 April 2015.⁶ The Government also asks that its application for an oral hearing is granted for the reasons set out in that

¹ Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation, ICC-01/13-27-Red, 23 June 2015 (hereinafter “Victim Observations filed by OPCV”). The confidential version was filed and circulated on 22 June 2015, with a public redacted version filed on 23 June 2015.

² Victim Observations pursuant to ‘Decision on Victims’ Participation’ of 24 April 2015, ICC-01/13-28-Red, 22 June 2015 (hereinafter “Victim Observations filed by Legal Representatives for Victims”). The confidential version was filed and circulated on 22 June 2015, with a public redacted version filed on 29 June and circulated on 30 June.

³ Regulations of the Court, Regulations 24, 34(b) and 33(1)(b).

⁴ Responses to victim observations have been filed by the parties including the OTP and accepted by the Court in numerous cases; see for example, Prosecution v. Ruto et al., Response on behalf of the Government of Kenya to the ‘Victims Observations on the Government of Kenya’s Appeal Concerning Admissibility of Proceedings’, ICC-01/09-01/11-226, 26 July 2011; Prosecution v. Ruto et al., Prosecution’s Response to the ‘Victims Observations on the Government of Kenya’s Appeal Concerning Admissibility of Proceedings’, ICC-01/09-01/11-230, 27 July 2011; Prosecutor v. Bemba, Defence Response to the Observations of the Legal Representatives of Victims on the Prosecutor’s Document in Support of the Appeal, ICC-01/05-01/08-521-tENG, 14 September 2009.

⁵ Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute, ICC-01/13-14-Red, 30 March 2015.

⁶ Application for Leave to Reply to Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute’, ICC-01/13-15, 9 April 2015.

application of 24 April 2015.⁷ The observations submitted by the Victims further underline the need for an oral hearing so that their evidence and views can be addressed in a public hearing with the parties having an opportunity to respond to them. In particular, the Prosecutor needs to explain if there is any good reason for still not being prepared to initiate an investigation in light of how the evidence of the Victims reveals that the IDF and the Israeli authorities had inculcated in those who should be investigated at the ICC complete, intentional, and callous disregard of international law.

II. VICTIMS' EVIDENCE AND OBSERVATIONS DEMONSTRATE GRAVITY OF THE SITUATION

4. The Applicant State Party has reviewed the submissions in the proceedings from the Victims, as filed on 22 June 2015. The Comoros unreservedly endorses the submissions made by the Office of the Public Counsel for Victims and Legal Representatives for the Victims. The Applicant submits that the Victim observations highlight that there is a compelling and properly substantiated basis for the Prosecutor to initiate an investigation of the crimes committed against the civilians on board of the vessels in the Flotilla.
5. The evidence from the Victims themselves shows that these were crimes, if proven, of great magnitude. They were perpetrated indiscriminately on the high seas, in the context of an international conflict and the continuing illegal blockade of Gaza in which peaceful civilians on the ships of the Flotilla - who sought to offer public support when providing humanitarian aid to besieged victims who were without adequate food and the necessities of life - were attacked with excessive violence, 9 (now 10) of them being shot dead.
6. The gravity threshold is clearly satisfied given the nature and the scale of the unlawful conduct in itself and when viewed in its relevant context of being linked to the blockade and the conflict in Gaza / Palestine. The Victims' evidence reveals that the Flotilla was attacked both as part of a specific plan and of a

⁷ Application for an Oral Hearing, ICC-01/13-19, 24 April 2015.

continuing policy to punish those who support Gaza, as those living in Gaza / Palestine are targeted by the IDF and the Israeli authorities (or at the very least, there is more than a sufficient basis to investigate the existence of such planning and policy).

7. The Government of the Comoros wishes to point out that these are crimes for which no one has been prosecuted and nor will they be prosecuted if the ICC does not respond positively to the Review Application its States Party has made. Those who should be investigated and charged will enjoy an immunity that will serve to encourage Israel and any other country that might wish to benefit from this Prosecutorial decision. It is a decision, if not reviewed and changed, that would allow and encourage future crimes on the high seas simply because in the Prosecutor's view not enough people are killed to expose perpetrators of crimes to risk of ICC intervention. It is entirely appropriate for the Situation to be investigated at the international level by the ICC, and it is for this reason that the Government of the Comoros as a States Party has turned to the ICC rightfully to exercise its jurisdiction.
8. The Government of the Comoros is fully committed to ensuring that the Victims obtain justice and that those responsible are not left unpunished. The ICC Prosecutor undoubtedly possesses jurisdiction over this case and there is no reason not to investigate the very serious and grave allegations. The case presents a most important opportunity for the Prosecutor to demonstrate that her office will do all it can to apply international criminal law on a universal basis. This case, properly investigated and pursued by the Prosecutor, will show the ICC *not* to be a court beholden in any way to any non States Party. It will show that where the Prosecutor has jurisdiction under the ICC Statute, she will act no matter who are the alleged perpetrators. It may become part of a history of acts by the ICC that will eventually compel non States Parties to fall in line with those other States which respect the institutions of the rule of law that the international community has created.
9. The Applicant State Party urges the Chamber to grant the unanimous requests of all of the Victims - namely, those already accepted to participate in the

proceedings and those who have applied who should clearly be recognised as Victims and have the chance to have their evidence and arguments taken into consideration at this crucial stage in the proceedings. They request that the Prosecutor is directed to reconsider her erroneous decision to refuse even to investigate the allegations and to apply the proper legal standard to initiate such an investigation without any further delay.

10. For all of these reasons the Government of the Comoros is resolutely pursuing the present Review proceedings so that the Prosecutor can be directed to reconsider her decision. It does so out of its duty to those on board the Mavi Marmara to ensure Comoros territory, as the vessel became when sailing under the Comoros flag, did not become a lawless place where crimes could be committed at will. It owed to the passengers killed and injured the same duty that *any* State would owe if passengers on vessels sailing under their flags were attacked without cause and killed and injured without reason. No responsible State, whether a 'great power' or not, would ever allow its territory on the high seas to become lawless land. No more will the Comoros, providing it is accorded by the ICC the respect for territory due to a State Party.
11. As noted above, the Chamber is again requested to permit the Government the opportunity to appear before it in an oral public hearing to reply to the Prosecutor and to address any questions and concerns that the Chamber may have that could assist the Chamber before making its determination.

III. RECENT FLOTILLA AND CONTINUING IDF CAMPAIGN

12. The Government of the Comoros also wishes to draw the Pre-Trial Chamber's and the Prosecutor's attention to the recent flotilla that sought to deliver humanitarian aid to Gaza. It was organised by a broad coalition of NGOs, and set sail from Gothenburg, Sweden. The IDF unlawfully and forcibly captured this flotilla (a Swedish ship, the Marianne) on 29 June 2015 in international waters and arrested all of the passengers on board, taking them to Ashdod for interrogation. Despite being at least 95 nautical miles off the coast of Israel the

passengers were brought to Israel against their will and then accused of entering Israel illegally.⁸

13. Certain of the passengers who had been on the 2010 Flotilla when it was attacked by the IDF, were also on the Marianne. They have been in contact and provided information about the recent flotilla. The Applicant State Party thus notifies the Chamber of this development and has submitted with this Response as confidential Annex A a statement of one of the passengers, himself a former IDF soldier, who was on both the 2010 Flotilla and the Marianne, and who has been accepted to participate as a Victim in the present proceedings. (There are other passengers who participated in both flotillas who will be providing statements that can be made available to the Chamber and the Prosecutor.)

14. As is set out in the statement, it is significant that no live ammunition was used against the passengers. The flotilla was stopped without shooting passengers. The IDF clearly understood on this occasion that they could not escape being the subject of some video footage reporting of their actions (and the Chamber will recall all efforts made by the IDF on the Mavi Marmara to destroy all methods of recording events and the seizure without return of cameras and phones in which evidence of crimes was recorded). By their actions the IDF revealed that the arrest of a vessel, however illegal and unjustified, could be accomplished without loss of passenger lives. By this very action they provided irrefutable evidence that their previous conduct on the Mavi Marmara was wholly ‘disproportionate’ as understood in international law (which does *not* mean that their actions in taking over the recent flotilla were in any way lawful, justified and proportionate - see submissions below). By this very act where they did *not* kill they make clear there is an infeasible case against the individuals who committed crimes in 2010 that the Prosecutor must now investigate (as there is a clear case against the IDF on the evidence from the latest flotilla, as summarised hereunder).

⁸ See for example, Spanish legislator on Gaza flotilla to sue Israel at ICC, Press TV, 1 July 2015 (<http://www.presstv.ir/Detail/2015/07/01/418276/Israel-Ana-Miranda-Paz-Gaza-Strip>); Spanish MEP to sue Israel over incarceration, Anadolu Agency, 30 June 2015 (<http://www.aa.com.tr/en/tag/547420--spanish-mep-to-sue-israel-over-incarceration>); Two Canadians detained after Israel illegally seizes Freedom Flotilla III ship Rabble.ca, 30 June 2015 (<http://rabble.ca/news/2015/06/two-canadians-detained-after-israel-illegally-seizes-freedom-flotilla-iii-ship>).

15. However, even on this occasion of the latest flotilla the IDF *did* use excessive and disproportionate force against passengers including by beating and tasing them.⁹ One passenger in particular was tasered by several IDF soldiers surrounding him as he screamed and cried for them to stop. A video is available of this incident.¹⁰ Another passenger was tasered for not removing a Palestinian scarf, an interference with many irrefragable human rights as any properly trained soldier should know. One passenger also witnessed IDF soldiers beating and tasing the ship's engineer in front of the captain when they realised that the engine of the ship had been disabled.¹¹ In addition, the passengers were subjected to threatening, harassing and degrading treatment and interrogations both on the ship and while detained in Israel, and were accused of supporting terrorism.¹² In public statements, Israeli officials claimed that the passengers supported terrorism and Hamas¹³ in the same way as had been voiced before and after the May 2010 Flotilla. As explained in the attached statement, threats were made to this passenger's life and that of his family and he was accused of having masterminded the flotillas as an enemy of Israel.
16. This evidence is submitted as relevant to showing both (by comparison) the *severity* of the attack on the May 2010 Flotilla (in which live ammunition was extensively used from helicopters and surrounding vessels, and on the Mavi Marmara once boarded), and that both attacks are part of the *continuing* campaign and policy of the IDF unlawfully to prevent any flotillas from breaking

⁹ See for example, Confidential Annex A and Freedom Flotilla III: An interview with Bob Lovelace, Rpn, 7 July 2015, at minute 9:31 (<http://rabble.ca/podcasts/shows/rabble-radio-special/2015/07/freedom-flotilla-iii-interview-bob-lovelace>). See also, Spanish legislator on Gaza flotilla to sue Israel at ICC, PressTV, 1 July 2015 (<http://www.presstv.ir/Detail/2015/07/01/418276/Israel-Ana-Miranda-Paz-Gaza-Strip>); Spanish MEP to sue Israel over incarceration, Anadolu Agency, 30 June 2015 (<http://www.aa.com.tr/en/tag/547420--spanish-mep-to-sue-israel-over-incarceration>); Two Canadians detained after Israel illegally seizes Freedom Flotilla III ship Rabble.ca, 30 June 2015 (<http://rabble.ca/news/2015/06/two-canadians-detained-after-israel-illegally-seizes-freedom-flotilla-iii-ship>).

¹⁰ See, <https://www.youtube.com/watch?v=HRgUEzUOfXA&feature=youtu.be>.

¹¹ Freedom Flotilla III: An interview with Bob Lovelace, Rpn, 7 July 2015, at minute 12:07 (<http://rabble.ca/podcasts/shows/rabble-radio-special/2015/07/freedom-flotilla-iii-interview-bob-lovelace>).

¹² See, Confidential Annex A.

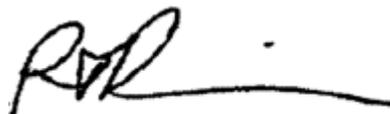
¹³ See, for example, PM Netanyahu on last night's navy action, Israel Ministry of Foreign Affairs website, 29 June 2015 (<http://mfa.gov.il/MFA/PressRoom/2015/Pages/PM-Netanyahu-on-last-night-Navy-action-29-Jun-2015.aspx>). On 29 June 2015 Prime Minister Netanyahu stated about Flotilla III that "*This flotilla is nothing but a demonstration of hypocrisy and lies that is only assisting the Hamas terrorist organization and ignores all of the horrors in our region.*"

the illegal blockade of Gaza. It shows absolute determination to block support for the people of Gaza, and to punish those who seek to assist them. It reinforces the Victims' submissions that the attack on the May 2010 Flotilla was rationally linked to the blockade and the situation in Gaza / Palestine, and thus plainly serious enough to warrant investigation by the ICC. As with those on the May 2010 Flotilla, the passengers on the latest flotilla were accused of being 'terrorists' by the IDF, thus again manifesting the obvious connection between the events on the flotillas, IDF policies and the wider conflict of which they form a part.

17. The evidence from the latest flotilla provides a further basis for Prosecutor to reconsider her decision, and if she refuses, the Applicant submits that the Chamber can and should rely on this information, together with all the evidence submitted by the Applicant and the Victims, to order reconsideration.

IV. CONCLUSION

18. For all of the reasons set out herein, and in its Review Application, and in the observations of the Victims, the Government of the Comoros submits that the Pre-Trial Chamber should direct the Prosecutor to reconsider her decision not to open an investigation.
19. In the event that the Chamber has any doubts about making such an order, the Applicant State Party should be permitted pursuant to its respective applications made in April to reply to the Prosecutor's Response and to be heard at an oral hearing to address any concerns and questions the Chamber may have before any decision is made about the Review Application.



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Dated 14 July 2015

London