



Original : English

Nº: ICC-01/13

Date: 08 February 2019

PRE-TRIAL CHAMBER I

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

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

**Public
With two Public Annexes**

**Transmission of Two Documents received from the Shurat Ha-Din – Israel Law
Center**

Source : Registry

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor

Counsel for the Defence

Legal Representatives of the Victims
Rodney Dixon

Legal Representatives of the Applicants
Nitsana Darshan-Leitner
Nicholas Kaufman

Unrepresented Victims

**Unrepresented Applicants
(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

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Registry hereby transmits to Pre-Trial Chamber I (“the Chamber”) two documents from Shurat Ha-Din – Israel Law Center, dated 08 February 2019, and received by the Registry on that same date.¹

II. Applicable Law

2. The present submission is made pursuant to rule 13(1) of the Rules of Procedure and Evidence and regulation 24*bis* of the Regulations of the Court.

III. Submission

3. The Registry hereby transmits the documents as:
 - **Annex I** – Request for leave to reply to Prosecution filing: ICC-01/13-83, and
 - **Annex II** – Provisional Registration Certificate – Mavi Marmara.



Marc Dubuisson, Director of the Division of Judicial Services
on behalf of Peter Lewis, Registrar

Dated this 08 February 2019

At The Hague, The Netherlands

¹ Email from Mr Nick Kaufman to the Court Records Office containing two documents, sent on 08 February 2019, at 10:14.

ANNEX I

PUBLIC



Original: **English**

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

Date: **08/02/2019**

PRE-TRIAL CHAMBER I

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

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

**PUBLIC
with one Public Annex**

Request for leave to reply to Prosecution filing: ICC-01/13-83

Source: "Shurat Ha-Din – Israel Law Center"

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor

Counsel for the Defence

Legal Representatives of the Victims
Rodney Dixon

Legal Representatives of the Applicant
Nitsana Darshan-Leitner
Nicholas Kaufman

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REGISTRY

Registrar
Peter Lewis

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

Pursuant to Regulation 24(5) of the Regulations of the Court, Shurat Ha-Din - Israel Law Centre ("the Applicant") requests leave to reply to the Prosecution request to dismiss *in limine* its application filed pursuant to Article 119(1) of the Rome Statute whereby it sought to persuade the learned Pre-Trial Chamber to resolve "*a dispute concerning the judicial functions*" of the International Criminal Court and to decline to deliberate further on the *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia* ("the Comoros Situation").

Relevant Statutory Provision

1. Regulation 24(5) of the Regulation of the Court provides:

"...[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated".

2. The learned Prosecutor's objection to *locus standi* under Article 119(1) of the Rome Statute is a new and unanticipated issue. As she stated in her response, the Prosecutor does not take "*any position at this time on the scope and function of article 119(1) in general*".¹ Had the Prosecutor *agreed* with the interpretation of article 119(1) formulated by the majority in what she terms the Bangladesh decision,² she would have said so frankly and would not have diplomatically reserved her position on the matter. Quite clearly the Prosecutor disagrees with the statutory basis for the Bangladesh decision yet cannot say so without rebuffing the judicial justification for

¹ ICC-01/13-83 at paragraph 4.

² ICC-RoC46(3)-01/18-37 at paragraph 28: "According to article 119(1) of the Statute, "[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court". This provision has been interpreted as including questions related to the Court's jurisdiction. It follows that the Chamber is empowered to rule on the question of jurisdiction set out in the Request in accordance with article 119(1) of the Statute. Consequently, the Chamber does not see the need to enter a definite ruling on whether article 19(3) of the Statute is applicable at this stage of the proceedings..."

the preliminary examination in Bangladesh/Myanmar which she has now initiated. In the circumstances, there exists a new and unanticipated issue which merits a reply from the Applicant, not least, to clarify the true legislative intent of Article 119(1) of the Rome Statute.

3. If given leave to reply, the Applicant will also present arguments as to why the majority ruling in the Bangladesh decision has now fashioned article 119(1) of the Rome Statute so as to create a novel procedure and mode of intervention for challenging jurisdictional issues especially when such issues constitute an abuse of the Court's "*judicial functions*". To this end, the Applicant will argue that Rule 103 is not to be viewed as *lex specialis* in the present situation any more than Article 19(3) of the Rome Statute was viewed as *lex specialis*, in the eyes of the learned majority in the Bangladesh decision for determining jurisdictional matters. The Applicant will further argue that its submissions, if made by way of Rule 103, will not achieve the end which is sought – namely persuading the learned Pre-Trial Chamber to terminate a procedure which, so it respectfully submits, is bringing the Court's reputation into disrepute and providing further ammunition to the Court's detractors.³ To this end, it will be recalled that the Applicant argues that the Court and the Prosecutor should never have seized themselves of the so-called Comoros situation in the first place since it was submitted to the Court without jurisdiction and, arguably, in bad faith.

4. Should leave to reply to the Prosecutor's response be denied, the Applicant will, in any event, ask that the Court consider its substantive observations as if they were made in the context of a Rule 103 *amicus curiae* request. While not presuming to trespass on the province of the learned judges, whose role is to examine the evidence and apply the law, the Applicant believes that its factual observations will be of

³ <https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech>.

“indispensable assistance”⁴ to the Pre-Trial Chamber when the Prosecutor reconsiders the gravity criterion and is required (as she no doubt will be) to defend her resubmitted findings.

5. These *amicus curiae* observations will be reinforced by an affidavit taken from a lawyer sent by the Applicant to the Union of the Comoros on or about 5 February 2019 to investigate the means whereby the Mavi Marmara was registered. This affidavit will testify to the fact that the Mavi Marmara was only provisionally registered in the Comoros by an agent based in the United Arab Emirates called Akram M. Shaikh.⁵ The Applicant’s lawyer will affirm that according to the information supplied to him, the same agent was involved in the supply of unlawful registration certificates and even after the termination of his agency by the Government of the Union of the Comoros, he continued to issue certificates such as the certificate acquired by IHH. While it appears that Comoros terminated the agency of Akram M. Shaikh after the flotilla incident, the Applicant believes that the information to which its lawyer will affirm shows that provisional registration certificates were by provided this agent in a completely unregulated and dubious fashion.

6. To conclude, the Applicant will seek to persuade the Pre-Trial Chamber that the “State of registration” of a vessel for the purpose of Article 12(2)(a), *inter alia*, means a State where permanent registration has been effected and not a State where a radical organization with a violent agenda has performed an intentionally fleeting registration in order to avoid liability for the consequences of harm which it purposefully intends to provoke.⁶

⁴ ICC-01/04-01/07-3003-tENG at paragraph 54.

⁵ Annex 1: Certificate of Provisional Registration of the Mavi Marmara.

⁶ <https://shippingwatch.com/carriers/Container/article9948964.ece> : “For a small amount of money and without notable requirements for documentation, the ship's last owner, typically a cash buyer using a holding company, can re-flag the vessel. The owner then saves money both on registration and insurance, and is able to distance

Relief Sought

7. In light of all the aforementioned, the learned Pre-Trial Chamber is respectfully requested to grant leave to reply to the Prosecution's response – ICC-01/13-83 or, in the alternative, to accept its observations as an *amicus curiae* submission pursuant to Rule 103 of the Rules of Procedure and Evidence.



Nitsana Darshan-Leitner
President, Shurat Ha-Din – Israel Law Center



Nicholas Kaufman
Counsel

Tel Aviv, Israel / Cairo, Egypt
Friday, February 08, 2019

itself from the ship if something goes wrong during the journey. This also applies to the ship's original owner, in this case Maersk, which can no longer be held liable" [emphasis added].

ANNEX II

PUBLIC

L'UNION DES COMORES UNION OF COMOROS

Unity - Solidarity - Development

Administration Maritime



Maritime Administration

PROVISIONAL REGISTRATION CERTIFICATE

Cert No. : D/RG/0333/UAE

Name of Vessel	Port of Registry	Official Number	Call Sign	IMO Number
MAVI MARMARA	MORONI	1201088	D 6 F U 2	9005869

This Maritime Administration of the Government of the Union of Comoros, having considered the application submitted to it by

Name, Residence and Description of Owners	Shares
INSAN HAK VE HURRIYETLERI VE INSANI YARDIM VAKFI - TURKEY	100%

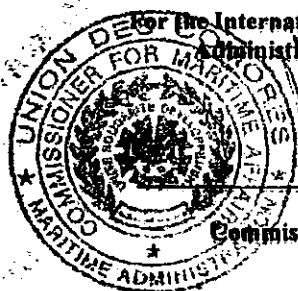
does hereby confirm its approval for the registration of the here below prescribed vessel in the International Register of Ships, in accordance to the provisions of the Regulations of the Merchant Shipping Act 2000.

In Witness of said approval, this certificate of Registration is issued, entitling the vessel to engage in international voyages, under the flag of the Union of Comoros.

GENERAL PARTICULARS

Type of Vessel	PASSENGER SHIP	Gross tonnage	4142
Previous Name	MAVI MARMARA	Net Tonnage	1243
Previous Flag	TURKEY	Length	82.45 M
Number of Decks	ONE	Breadth	15.80 M
Number of Masts	ONE	Moulded Depth	5.71 M
Year and place of Built	1994, TURKEY	Material	STEEL
Builders	TURKIYE GEMI SANAYI A.S.		
Number of Engines	TWO	Engine output (KW)	2 x 2200
Type of Engines	6R32D	Number of Cylinders	6
Year of Engines Built	1992	Diameter (mm)	320
Place of Engines Built	FINLAND	Length of Stroke (mm)	350
Engine Makers	WARSTILA DIESEL		
Classification Society	PHOENIX REGISTER OF SHIPPING		

This certificate is issued at Sharjah on the 19th day of May of the year 2010
Under the authority of the Government of the Union Comoros and it
is valid until the 18th day of November of the year 2010



For the International Ships Registry of the Maritime
Administration of the Union of Comoros

Akram M. Shaikh
Commissioner for Maritime Affairs

Form Nr:120021-1a