

REGISTERED VESSELS OF COMOROS, GREECE AND CAMBODIA

Procedural History

314. On 14 May 2013, the OTP received a referral on behalf of the Government of the Union of the Comoros (“Comoros”) with respect to the 31 May 2010 Israeli interception of a humanitarian aid flotilla bound for the Gaza Strip. On the same day, the Prosecutor announced that she had opened a preliminary examination on the basis of the referral. On 5 July 2013, the Presidency of the ICC assigned the situation to PTC I.
315. On 6 November 2014, the Prosecutor announced that the information available did not provide a reasonable basis to proceed with an investigation of the situation on certain registered vessels of Comoros, Greece, and Cambodia that arose in relation to the 31 May 2010 incident. This conclusion was based on a thorough legal and factual analysis of the information available and pursuant to the requirement in article 17(1)(d) that cases shall be of sufficient gravity to justify further action by the Court. The Office issued a detailed report presenting its findings on jurisdictional and admissibility issues.²⁴
316. On 29 January 2015 the Representatives of the Comoros filed an application for review of the Prosecutor’s decision not to proceed, pursuant to article 53(3)(a) of the Statute.
317. On 16 July 2015, PTC I, by majority, requested the Prosecutor to reconsider her decision pursuant to article 53(3) of the Statute, having considered that the Prosecutor had erred in concluding that the potential case(s) arising from the situation would not be of sufficient gravity to be admissible at the Court.
318. On 6 November 2015, the Appeals Chamber, by majority, dismissed *in limine* the Prosecutor’s appeal against the PTC I’s request on the basis that it was not a decision “with respect to [...] admissibility” within the meaning of article 82(1)(a) of the Statute. In particular, the majority concluded that it was not “a determination of admissibility that would have the effect of obliging the Prosecutor to initiate an investigation”; to the contrary, “the final decision in this regard” was “reserved for the Prosecutor.”
319. Dismissing the Prosecutor’s appeal terminated the suspensive effect of PTC I’s request, which had been ordered by the Appeals Chamber. This triggered the Prosecutor’s duty, under rule 108(2), to review her decision “as soon as possible.”

²⁴ ICC-OTP, [Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53\(1\) Report](#), 6 November 2014.

320. On 29 November 2017, the Prosecutor notified PTC I of her “final decision”, as required by rule 108(3).²⁵ Having carried out a thorough review of all the submissions made and all the information available, including information newly made available in 2015-2017, the Prosecutor remained of the view that the information available did not provide a reasonable basis to proceed with an investigation. The final decision filed with the Court provided extensive reasoning in support of this conclusion.

Preliminary Jurisdictional Issues

321. Of the eight vessels in the flotilla, only three were registered in States Parties. Pursuant to article 12(2)(a) of the Statute, the Court has jurisdiction *ratione loci* over crimes committed on board these three vessels, registered respectively in the Comoros (the *Mavi Marmara*), Cambodia (the *Rachel Corrie*) and Greece (the *Eleftheri Mesogios/Sofia*). Although Israel is not a State Party to the Statute, according to article 12(2)(a) of the Statute, the ICC can exercise its jurisdiction in relation to the conduct of non-State Party nationals alleged to have committed Rome Statute crimes on the territory of, or on vessels and aircraft registered in, an ICC State Party.

322. The Court has jurisdiction over Rome Statute crimes committed on the territory of Comoros or by its national as of 1 November 2006. The Court also has jurisdiction over Rome Statute crimes committed on the territory of Cambodia or by its nationals as of 1 July 2002, and those committed on the territory of Greece or by its nationals as of 1 August 2002. The situation forming the subject of the referral began on 31 May 2010 and encompasses all alleged crimes flowing from the interception of the flotilla by the Israeli forces, including the related interception of the *Rachel Corrie* on 5 June 2010. These events forming the subject of the referral are collectively referred to as the “flotilla incident” for the purposes of this report.

323. Litigation before PTC I saw an increased emphasis by the Comoros, and participating victims, on allegations of misconduct by Israeli nationals on Israeli territory against flotilla passengers awaiting lawful deportation. As confirmed by PTC I, the Court does not have jurisdiction over these crimes. However, these allegations may be taken into account to the extent necessary in assessing whether there is a reasonable basis to proceed with an investigation into crimes committed during the flotilla incident itself (*i.e.*, aboard the vessels), over which the Court does have jurisdiction.

324. In its final decision, the Office noted that, on the facts of this situation, it could not identify a sufficient factual basis to make it “necessary”, in the PTC’s words, to take into account events on Israeli territory in order to assess the gravity of the

²⁵ [Notice of Prosecutor's Final Decision under Rule 108\(3\)](#), ICC-01/13-57, 29 November 2017. [Statement of ICC Prosecutor, Fatou Bensouda, on the Situation on registered vessels of the Union of the Comoros et al.](#), 30 November 2017.

potential case within the Court's jurisdiction. In particular, while there is a continuum between the victims of the alleged conduct, there appears to be no sufficient link between the perpetrators of the alleged misconduct on Israeli territory and the alleged perpetrators of the identified crimes within the Court's jurisdiction, nor reason to believe that flotilla passengers were abused systematically or on a planned basis aboard the *Mavi Marmara* and on land. These conclusions are unaffected by the additional information made available in 2015-2017.

Contextual background

325. On 3 January 2009, Israel imposed a naval blockade off the coastline of the Gaza Strip up to a distance of 20 nautical miles from the coast. Israel stated that the primary purpose of the blockade was military-security, namely to prevent the flow of arms and ammunition to Hamas by sea. The blockade, however, has been controversial due to its impact on the civilian population of Gaza.
326. The Free Gaza Movement was formed to challenge the blockade. It organised the "Gaza Freedom Flotilla", an eight-boat flotilla with over 700 passengers from approximately 40 countries, with the stated intentions to deliver aid to Gaza, break the Israeli blockade, and draw international attention to the situation in Gaza and the effects of the blockade.
327. The IDF intercepted the flotilla on 31 May 2010 at a distance of 64 nautical miles from the blockade zone. By that point, one of the vessels in the flotilla had withdrawn due to mechanical difficulties, and another (the *Rachel Corrie*) had been delayed in its departure and thus was not able to join the rest of the flotilla and only continued towards Gaza separately at a later date. The six remaining vessels were boarded and taken over by the IDF. The interception operation resulted in the deaths of ten passengers of the *Mavi Marmara*, nine of whom were Turkish nationals and one with Turkish and American dual nationality.
328. The situation was the subject of a UN Human Rights Council Fact-Finding Mission, which delivered its report in September 2010, and a separate Panel of Inquiry appointed by the UN Secretary-General, which published its report in September 2011. The Governments of Turkey and Israel have also conducted national inquiries.

Subject-Matter Jurisdiction

329. In its report of 6 November 2014, and for the reasons set out therein, the Office determined that there was a reasonable basis to believe that war crimes were committed on board the *Mavi Marmara* during the interception of the flotilla on 31 May 2010 in the context of an international armed conflict, namely: wilful killing pursuant to article 8(2)(a)(i), wilfully causing serious injury to body and health pursuant to article 8(2)(a)(iii), and committing outrages upon personal dignity pursuant to article 8(2)(b)(xxi) of the Statute. The Office noted, in this

context, that the protected civilian status of the passengers aboard the *Mavi Marmara* did not preclude, in certain circumstances, the possibility for the lawful use of force. However, since the question of excuses or justifications for the use of force relate to the criminal responsibility of particular individuals, it was determined that this was a matter to be properly addressed at the investigation stage, if any, and not in the course of preliminary examination.

330. The Prosecutor's determination of subject-matter jurisdiction over the events aboard the *Mavi Marmara* was not in issue before PTC I, and therefore is unaffected by the Prosecutor's subsequent review under article 53(3) and rule 108(3). This determination is re-affirmed in the Prosecutor's final decision filed with the Court.

Admissibility Assessment

331. In its report of 6 November 2014, the Office determined that the potential case(s) that would likely arise from an investigation of the flotilla incident would not be of sufficient gravity to justify further action by the Court, in light of the criteria for admissibility provided in article 17(1)(d) and the guidance outlined in article 8(1) of the Statute.
332. The parameters of the Office's assessment were determined by the limited scope of the situation referred, namely a confined series of events that occurred primarily on 31 May 2010, aboard the *Mavi Marmara*. As such, the 6 November 2014 report reasoned, the potential case(s) that could be pursued by this Court were inherently limited to an event encompassing a relatively small number of victims of the alleged ICC crimes, with limited countervailing qualitative considerations.
333. Likewise, although the interception of the flotilla took place in the context of the Israel-Hamas conflict, as noted in the 6 November 2014 report, the Court does not have jurisdiction over other alleged crimes committed in this context, nor in the broader context of any conflict between Israel and Palestine. While the situation with regard to the civilian population in Gaza is a matter of international concern, this issue had to be distinguished from the Office's assessment, which was limited to evaluating the gravity of the alleged crimes committed by Israeli forces on board the vessels over which the Court has jurisdiction.
334. Given the Office's conclusion in the 6 November 2014 report concerning the lack of sufficient gravity, it was unnecessary to reach a further conclusion on the question of complementarity.
335. In the course of the review requested by PTC I, the Office considered afresh whether any potential case(s) arising from the flotilla incident would be sufficiently grave so as to be admissible for the purpose of articles 17(1)(d) and 53(1)(b) of the Statute.

336. In concluding the review, the Prosecutor reaffirmed her previous determination in the 6 November 2014 report. She concluded that, in the absence of a potential case of sufficient gravity arising from the situation, there is no reasonable basis to proceed with an investigation. This was for three reasons.
337. First, PTC I's request did not lend itself to justifiable grounds to reverse the Prosecutor's previous decision. More specifically, the Office's further assessment and scrutiny following the Pre-Trial Chamber I's request have led the Prosecutor to reaffirm the Office's legal reasoning concerning the standard of proof for preliminary examinations under article 53(1); the standard of review to be applied by a Pre-Trial Chamber under article 53(3); and the substantive analysis actually carried out.
338. Second, and in any event, the arguments presented by the Comoros and the legal representatives of victims do not demonstrate that the Office's assessment of the information made available in 2014 was unreasonable, unfair, or legally incorrect. In particular, on the basis of the information available, there was no reasonable basis to believe that the identified crimes were committed on a large-scale or as part of a plan or policy. Nor did the Office err in assessing the nature or impact of the identified crimes, or in its approach to allegations of other misconduct on Israeli territory, beyond the jurisdiction of this Court.
339. Third, in the interests of completeness and transparency—even though not strictly required in the context of rule 108(3)—the Office considered whether the new materials made available after the November 2014 report (in 2015-2017) required it to depart from its prior conclusions. However, submissions by the Comoros and legal representatives of victims made on the basis of these new materials either were consistent with its original findings or were not reasonably supported by any of the available information.
340. As a consequence of this analysis, the outcome of the preliminary examination remains the same. The potential case(s) that would likely arise from an investigation of the flotilla incident would not be of sufficient gravity to justify further action by the Court, in light of the criteria for admissibility provided in article 17(1)(d) and the guidance outlined in article 8(1) of the Statute. Consequently, it remains unnecessary to consider the question of complementarity. The Prosecutor fully recognises the impact of the alleged crimes on the victims and their families and her conclusion does not excuse any crimes which may have been perpetrated in connection with the *Mavi Marmara* incident.

OTP Activities

341. Over the reporting period, the Office concluded a *de novo* review of all the information available to it both prior and since the 6 November 2014 report was issued.

342. This entailed a thorough review of PTC I's reasoning in its request, but also the submissions of the representatives of the authorities of the Comoros, independent counsel for certain participating victims, and the Office of Public Counsel for Victims for the remainder of the participating victims, and a fresh reconsideration of all the information available at the time of the November 2014 determination.
343. Additionally, under the discretion vested in the Prosecutor by article 53(4) of the Statute, this review entailed a de novo examination of all submissions and information made available in the period 2015-2017 by representatives of the Comoros and participating victims. In total, the OTP has subjected to renewed analysis more than 5,000 pages of documents, including the personal accounts of more than 300 passengers aboard the *Mavi Marmara*, as well as other materials.

Conclusion and next steps

344. The Prosecutor notified PTC I of her final decision on 29 November 2017, providing extensive reasoning in support of her conclusion. The Office has completed its review and issued its final decision under rule 108(3). This closes the preliminary examination, subject to the Prosecutor's ongoing and residual discretion under article 53(4) of the Statute.