

Cour  
Pénale  
Internationale



International  
Criminal  
Court

Original: **English**

No: **ICC-01/13**  
Date: **7 August 2015**

**THE APPEALS CHAMBER**

**Before:**  
**Judge Sanji Mmasenono Monageng**  
**Judge Silvia Fernández de Gurmendi**  
**Judge Christine Van Den Wyngaert**  
**Judge Howard Morrison**  
**Judge Piotr Hofmański**

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

**Public**

***Amicus Curiae* Observations of the European Centre for Law & Justice Pursuant to  
Rule 103 of the Rules of Procedure and Evidence**

**Source:** **European Centre for Law & Justice (ECLJ)**

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

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**Other**

Your Excellencies:

### Submissions

1. By way of introduction, the European Centre for Law & Justice (ECLJ) is an international not-for-profit law firm located in Strasbourg, France, dedicated, *inter alia*, to establishing and strengthening the rule of law in world affairs. The ECLJ also holds Special Consultative Status as an NGO before the United Nations Economic and Social Council<sup>1</sup>.
2. This brief is submitted in support of ICC Prosecutor Fatou Bensouda's decision not to initiate a formal investigation into the Mavi Marmara matter<sup>2</sup> and her subsequent decision to appeal in response to the Pre-Trial Chamber I's questioning of her decision<sup>3</sup>. For the reasons given below, the Appeals Panel should accept the Prosecutor's appeal.
3. The ECLJ would welcome the opportunity to present the following arguments in greater detail, either in writing or orally, if requested by the Appeals Panel.

### Issue of Jurisdiction

4. The initial task of any court is to determine whether the Court has jurisdiction to hear and adjudicate a matter. Because jurisdiction provides the legal basis on which a court has authority to proceed, it is an issue that one must be able to raise as early as possible in a proceeding. Hence, we raise that issue here.
5. The ECLJ submits that the International Criminal Court (ICC) lacks jurisdiction over the nationals of a non-consenting, non-member State to the Rome Statute based on the well-established customary international law principle that a State that has not become a party to a

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<sup>1</sup>NGO Branch, UN. Dep't of Econ. & Soc. Affairs, Consultative Status for the European Centre for Law and Justice (2007), <http://esango.un.org/civilsociety/> (accessed by searching "European Centre for Law and Justice" in the iCSO Database) (last visited 8 Aug. 2015).

<sup>2</sup>Situation on Registered Vessels of Comoros, Greece and Cambodia, ICC-01/13-6-AnxA, Article 53.1. Report (6 Nov. 2014) [hereinafter Prosecutor's Decision Not to Investigate].

<sup>3</sup>Situation on Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-34, Decision on the Request of the Union of Comoros to Review the Prosecutor's Decision Not to Initiate and Investigation (16 July 2015) [hereinafter Pre-Trial Chamber Decision].

treaty or other international convention is not bound by the terms of such treaty or convention<sup>4</sup>. Israel is such a State.

6. Accordingly, Article 12.2.(a)<sup>5</sup> of the Rome Statute, which seems to permit the ICC to exercise jurisdiction over nationals of non-consenting, non-member States when such States' nationals are alleged to have committed an Article 5 crime on the territory of a State Party to the Rome Statute, violates well-established customary international law as it applies to non-consenting, non-party States' nationals. As such, application of Article 12.2.(a) against the nationals of such States is *ultra vires*, absent the prior consent of such States.

7. Because none of the States Parties to the Rome Statute could lawfully compel a non-consenting State to accede to the Statute's terms against its will, neither may a creation of the Statute (like the Office of the Prosecutor (OTP)) do so. What States Parties themselves may not lawfully do, may not be done by their agent. The States Parties to the Rome Statute could only convey to the OTP authority that the States Parties themselves lawfully possess. Since the States Parties themselves lacked lawful authority to compel a non-consenting, non-party State to participate in the Rome Statute regime, they lacked authority to authorise the OTP to do so<sup>6</sup>. Hence, Article 12.2.(a) constitutes an unlawful overreach and is, therefore, *void ab initio* vis-à-vis the nationals of non-consenting, non-party States.

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<sup>4</sup>See, e.g., Vienna Convention on the Law of Treaties, art. 34, 23 May 1969, 1155 U.N.T.S. 331. Article 34 simply incorporates the customary law principle into the treaty. This is a common practice, and doing so does not remove the principle from customary international law, although it does make it part of *binding conventional law* for those States which are a party to the treaty which incorporates the customary law principle. See also generally Jay Alan Sekulow & Robert Weston Ash, *Trying Nationals of Non-Consenting, Non-Party States Before the International Criminal Court: An Unlawful Overreach*, ExpressO (available at: [http://works.bepress.com/robert\\_ash/1](http://works.bepress.com/robert_ash/1)) (see APPENDIX A for copy of article); see also *id.* at 21–34 (analysing applicable international law).

<sup>5</sup>Article 12.2. of the Rome Statute reads, in pertinent part, as follows:

2. In the case of article 13 [deals with Exercise of Jurisdiction], paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft . . . .

Rome Statute of the International Criminal Court art. 12.2.(a), 17 July 1998, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute]. Note that Article 12.2.(a) appears to apply irrespective of the nationality of the alleged perpetrator of the crime. Accordingly, nationals of non-party States accused of Article 5 crimes can be subject to ICC prosecution according to the Rome Statute.

<sup>6</sup>Article 13(b) is the only lawful exception to the non-consent-based jurisdiction requirement. Yet, even when the UN Security Council, acting under Chapter VII of the UN Charter, refers a situation to the ICC Prosecutor, the affected non-member State must comply, *not based on any article in the Rome Statute to which it is not a State Party*, but because of its membership in the UN and its obligation under the UN Charter to obey Security Council resolutions promulgated under Chapter VII.

8. Knowingly applying an unlawful provision of a treaty, whether by a prosecutor, a judge or anyone else, violates the rule of law. Hence, the Prosecutor's appeal should be granted for the reason, *inter alia*, that both she and the Pre-Trial Chamber (PTC) lack lawful authority to deal with Israeli nationals due to Article 12.2.(a)'s violation of customary international law.

9. Accordingly, the ICC may not exercise jurisdiction over Israeli commandos and government officials involved in the Mavi Marmara affair since they were all acting in their capacity as agents of the State of Israel, a non-State Party to the Rome Statute.

### Issue of Evidence

10. The ECLJ further submits that a critical error on the PTC's part was that it impugned the Prosecutor's conclusions regarding the gravity of the matter which she based on her assessment of the available evidence. Yet, as long as the Prosecutor's conclusions could be reasonably drawn from the available evidence, then the Prosecutor was well within the bounds of her discretion, and the PTC majority was wrong to substitute its preference for the Prosecutor's. *Only if* the evidence could *not* support the Prosecutor's conclusion in any reasonable circumstance could she have legitimately been found to have erred in her exercise of discretion.

11. The PTC's majority opinion correctly noted that "the Prosecutor has discretion to open an investigation"<sup>7</sup> and that it must give some deference to the Prosecutor's decisions<sup>8</sup>. Nonetheless, the majority seems to have deviated from its own principles when analysing the Prosecutor's Decision Not to Investigate, not because the Prosecutor failed to consider all evidence available or mischaracterised the evidence, but simply because the PTC disagreed with the Prosecutor's conclusion. Substituting its preferred conclusion for the Prosecutor's is not the role of the PTC. As long as the Prosecutor's conclusion is reasonable in light of the facts and law, it should be supported.

12. Moreover, as the PTC dissenting opinion aptly noted, Article 53 "provides the Prosecutor with some margin of discretion" and "calls for a more deferential approach when

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<sup>7</sup>Pre-Trial Chamber Decision, *supra* note 3, at ¶ 14.

<sup>8</sup>*Id.* at ¶ 15.

reviewing the Prosecutor’s decision”<sup>9</sup>. The dissenting opinion further notes that the PTC’s “role is merely to make sure that the Prosecutor has not abused her discretion in arriving at her decision not to initiate an investigation on the basis of the criteria set out in article 53.1. of the Statute”<sup>10</sup>. The majority did not give due deference to the Prosecutor’s analysis of evidence and her conclusion. Instead, the majority simply sought to replace the Prosecutor’s conclusion with its own.

### **German Prosecutor Reaches Same Conclusion as ICC Prosecutor**

13. The ECLJ urges the Panel to take cognizance of the attached German decision which we submit as a guiding precedent for the OTP’s decision<sup>11</sup>. The German Prosecutor General reached a similar conclusion to the ICC Prosecutor regarding similar charges brought under German law by Ms Inge Höger, a member of the German Bundestag who was aboard the Mavi Marmara during the Israeli operation. The German Prosecutor found no legal basis for establishing that the war crimes Ms Höger alleged had been committed:

“The Israeli actions followed the overall objectives for the operation, namely to gain control of the vessels and not to harm individuals. The reason for the escalation on the ‘Mavi Marmara’ was the resistance by passengers and crew towards the first Israeli commando and that a group of passengers engaged in “grave, organized and violent” forms of resistance”<sup>12</sup>.

### **Object and Purpose of Article 53**

14. The PTC also deviated from Article 53.1.’s purpose when it stated that, “[i]f the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least *one crime* within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor *shall* open an investigation, as only by

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<sup>9</sup>Situation on Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-34-Anx, Partly Dissenting Opinion of Judge Péter Kovács, ¶ 8 (16 July 2015) [hereinafter Dissenting Opinion].

<sup>10</sup>*Id.* at ¶ 7.

<sup>11</sup>See APPENDIX B for a copy of the German Prosecutor’s decision in German, immediately followed by an unofficial English translation.

<sup>12</sup>See APPENDIX B, English translation of Prosecutor’s letter.

investigating could doubts be overcome”<sup>13</sup>. Contrary to the PTC’s interpretation, as the dissent noted, Article 53.1.’s purpose is to “stop proceedings in relation to ‘acts of [in]sufficient gravity to warrant trial at the international level’”<sup>14</sup>. Under Article 53.1., to determine whether to start an investigation, the Prosecutor is not only bound to consider whether “[t]he information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been . . . committed”<sup>15</sup>, but also whether potential cases that might arise from the investigation are of such gravity that they necessitate the Court’s intervention<sup>16</sup>.

15. Additionally, contrary to the majority’s understanding, as the dissent noted, “the fact that a case addresses one of the most serious crimes of the international community as a whole is not sufficient for it to be admissible before the Court”<sup>17</sup>. In the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, for example, Pre-Trial Chamber II stated that “the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases”<sup>18</sup>. As such, Article 53.1. serves to limit the Court’s power of investigation instead of expanding it as suggested by the PTC. In any legal controversy, both sides present conflicting accounts of facts. Article 53 would be rendered superfluous if, as the PTC’s majority suggested, the Prosecutor must start investigation just because there are “several plausible explanations of the available

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<sup>13</sup>Pre-Trial Chamber Decision, *supra* note 3, at ¶ 13 (emphasis added).

<sup>14</sup>Dissenting Opinion, *supra* note 9, at ¶ 15 (citing to International Law Commission, Summary Record of the 2330th Meeting, 1994 YILC Vol. I, p. 9).

<sup>15</sup>Rome Statute, *supra* note 5, at art. 53.1.(a) (emphasis added). Note that 1) the language “information available to the Prosecutor” shows that the Prosecutor is not required to start an investigation in order to look for more information; 2) the language “reasonable basis” shows that the evidence available does not have to lead to only one conclusion; and 3) the term “believe” shows Article’s discretionary nature as opposed to requiring the Prosecutor to apply more stringent and exacting legal requirements, which would certainly be required at the investigation stage.

<sup>16</sup>Rome Statute, *supra* note 5, at arts. 53.1.(b), 17(1)(d).

<sup>17</sup>See Dissenting Opinion, *supra* note 9, at ¶ 15 (quoting Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/06-8-Corr, Decision on the Prosecutor’s Application for a warrant of arrest, ¶ 41 (10 February 2006)); Prosecutor’s Decision Not to Investigate, *supra* note 2, at ¶ 134 (citing Situation in the Republic of Côte d’Ivoire, ICC-02/11-14-Corr, Corrigendum to Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, ¶¶ 202-04 (15 Nov. 2011); Situation in the Republic of Kenya, ICC-01/09-49 Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, ¶¶ 48, 50 (31 March 2010) ).

<sup>18</sup>See Dissenting Opinion, *supra* note 9, at ¶ 16 (citing Situation in the Republic of Kenya, ICC 01/09 49-Corr, ¶ 56).

information”<sup>19</sup>. In other words, Article 53.1.’s purpose is that there might be potential cases, but the Prosecutor is not required to start investigation for every possible claim.

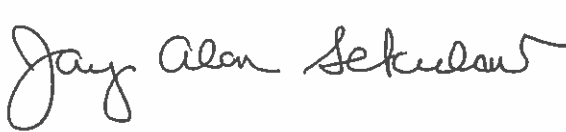
16. WHEREFORE, in light of the foregoing, the ECLJ respectfully urges The Appeals Chamber to accept the Prosecutor’s appeal and to find:

*First*, that, under customary international law, the ICC lacks jurisdiction over the nationals of non-member, non-party States to the Rome Statute (like Israel), absent such States’ express consent.

*Second*, that the PTC was mistaken as a matter of law when it concluded that the Prosecutor had erred in her exercise of discretion and substituted its preference for that of the Prosecutor in this matter.

Word count: 2558<sup>20</sup>

Respectfully submitted this 7th day of August, 2015.



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<sup>19</sup>Pre-Trial Chamber Decision, *supra* note 3, at ¶ 13.

<sup>20</sup>It is certified that this document contains the number of words specified and complies in all respects with the requirements of regulation 36 of the RoC. This statement (51 words), not itself included in the word count, follows the Appeals Chamber’s direction to “all parties” appearing before it: ICC-01/11-01/11-565 OA6, ¶ 32.