ANNEX I
PUBLIC

Cour
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International
Criminal
Court

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

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
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States' Representatives
Rodney Dixon

Amicus Curiae

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]

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[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.

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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].