

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/13

Date: 19 August 2015

THE APPEALS CHAMBER

Before: Judge Christine Van Den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Silvia Fernández de Gurmendi
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 Document

**Observations of the Victims on the admissibility of the Prosecution's
"Notice of Appeal of 'Decision on the request of the Union of the Comoros
to review the Prosecutor's decision not to initiate an investigation' (ICC-
01/13-34)"**

Source: Sir Geoffrey Nice QC and Rodney Dixon QC, Legal
Representatives for Victims

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

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**Victims Participation and Reparations
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I. INTRODUCTION

1. The Victims of the attack on the Gaza Freedom Flotilla who are represented by the Legal Representatives, Sir Geoffrey Nice QC and Rodney Dixon QC, ("the Victims") hereby submit their observations on the admissibility of the Prosecution's "Notice of Appeal of 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation' (ICC-01/13-34)"¹ pursuant to the "Directions on the conduct of proceedings" from the Appeals Chamber.²
2. The Legal Representatives have informed the Victims of the Pre-Trial Chamber's decision³, and the appeal proceedings initiated by the Prosecution. In these observations the Victims respond to the submissions made by the Prosecution⁴, Government of the Comoros⁵ and Office of the Public Counsel for Victims (OPCV)⁶ on the admissibility of the Prosecution's Notice of Appeal.
3. The Victims are most disappointed by the Prosecution's decision to seek to appeal the Pre-Trial Chamber's decision, instead of reconsidering without delay the decision not to open an investigation into the crimes

¹ Notice of Appeal of 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation' (ICC-01/13-34), ICC-01/13-35, 27 July 2015 (hereinafter "Prosecution Notice of Appeal").

² Directions on the conduct of proceedings, ICC-01/13-42, 6 August 2015, para. 4.

³ Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ICC-01/13-34, 16 July 2015.

⁴ Prosecution Notice of Appeal, paras. 6-14.

⁵ Application by the Government of the Comoros to dismiss *in limine* the Prosecution "Notice of Appeal of 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation' (ICC-01/13-34)", ICC-01/13-39, 3 August 2015 (hereinafter "Comoros Application to dismiss in limine").

⁶ Victims' request for directions on the conduct of the proceedings following the 'Notice of Appeal of 'Decision on the request of the Union of the Comoros to review the Prosecution not to initiate an investigation' (ICC-01/13-34)', ICC-01/13-41, 5 August 2015, paras. 12, 17.

committed against them. So much time has already been expended on the preliminary examination with the Prosecution showing no enthusiasm and urgency to investigate these crimes. Even when the Prosecutor has been directed to reconsider her position, her first response is to try to appeal that decision on a spurious legal basis under Article 82(1)(a) that has been repeatedly rejected by the Appeals Chamber itself.

4. The Victims accordingly support the Government of the Comoros in requesting the Appeals Chamber to find that the appeal is inadmissible based on the clear and express provisions of the Statute and the Appeals Chamber's jurisprudence. The Principal Counsel of the Office of the Public Counsel for Victims has similarly stated that the appeal should be dismissed *in limine*.
5. There is no proper legal basis for the appeal, and the Prosecutor should instead proceed with reconsidering her decision as swiftly as possible. This should include sincerely and openly considering the evidence submitted by the Victims. The Pre-Trial Chamber's decision is perfectly reasonable in requesting the Prosecutor to reassess whether an investigation should be opened in accordance with her mandate. It is only through this candid and impartial process of re-evaluation that the Victims may obtain justice for the inexcusable and very serious crimes that have been perpetrated against them.

II. SUBMISSIONS

6. The Victims submit that the Prosecutor's purported appeal of the Pre-Trial Chamber's decision⁷ under Article 82(1)(a) should be dismissed *in limine* as being inadmissible.
7. The Prosecutor has consistently opposed any appeals under this provision that have not been against decisions that clearly and directly determine admissibility. She should not now be permitted to take a different position just because it suits the Prosecution to challenge the Pre-Trial Chamber's decision on reconsideration. This decision is not on any view one that declares the case to be either *admissible* or *inadmissible* – the whole point of the review procedure under Article 53 is for the Chamber only to decide whether a decision by the Prosecutor not to open an investigation should be *reconsidered*.
8. It is disingenuous for the Prosecution to argue that the present decision of the Pre-Trial Chamber is in fact one in which the Pre-Trial Chamber has ordered that the potential cases *are* admissible.⁸ The Chamber is without question not authorised to make any such ruling under Article 53. The Prosecution would never have taken this position were it not trying to appeal the present decision directly to the Appeals Chamber.
9. The Prosecution has previously sought to emphasise the precise opposite of the argument it now advances, namely that the Pre-Trial Chamber cannot overrule the decision of the Prosecutor to close a preliminary

⁷ Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ICC-01/13-34, 16 July 2015.

⁸ Prosecution's Further Submissions concerning Admissibility, ICC-01/13-47, 14 August 2015, paras. 24-29.

examination merely because it takes a different view of the gravity of the case.⁹

10. The Appeals Chamber's own case law (which the Prosecution has previously supported unwaveringly) confirms that only decisions which determine whether the case is admissible or not at that stage in the proceedings when the decision is made, may be appealed under Article 82(1)(a).¹⁰ Irrespective of whether the decision or the admissibility of the case may still be reconsidered in the future if the circumstances change, the impugned decision itself must be one which has made a ruling on whether the case is admissible or not at the time it is rendered.

11. As highlighted by the Government of the Comoros, the Prosecution has distorted and corrupted the ICC's case law on point¹¹ in attempting to carve out an exception to make its appeal admissible. The present

⁹ See for example, 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, paras. 13-16.

¹⁰ See, Situation in the Republic of Kenya, Decision on the admissibility of the 'Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence'', ICC-01/09-78, 10 August 2011, paras. 15-18; Prosecutor v. Gaddafi and Al-Senussi, Decision on 'Government of Libya's Appeal Against the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi'' of 10 April 2012, ICC-01/11-01/11-126, 25 April 2012, paras. 13-16; Prosecutor v. Gaddafi and Al-Senussi, Decision on the admissibility of the 'Appeal Against Decision on Application Under Rule 103' of Ms Mishana Hosseinioun of 7 February 2012, ICC-01/11-01/11-74, 9 March 2012, paras. 10-12; Prosecutor v. Katanga, Decision on the admissibility of the appeal against the "Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRCD02-P0228 and DRC-D02-P0350", ICC-01/04-01/07-3424, 20 January 2014; Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'', 13 July 2006, ICC-01/04-169, paras. 9, 18.

¹¹ Comoros Application to dismiss in limine, para. 10, 14. See, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'', 13 July 2006, ICC-01/04-169 (OA), para. 8.

decision could at most have an 'affect' or 'impact' on the question of admissibility as the Prosecutor has been requested to reconsider whether to open an investigation, but as held by the Appeals Chamber, this is not sufficient to permit an appeal under Article 82(1)(a).¹²

12. The Victims have unfailingly pressed the Prosecution to investigate the present Situation. They have highlighted that "[d]espite making themselves available to provide evidence to the Prosecutor and 'to clarify the facts' ... so that she could make a fully informed decision about the seriousness of the allegations, none of the victims has been approached by the Prosecutor."¹³ They have stressed that "uncertainty", "conflicting accounts" and a "lack of sufficient information"¹⁴ are "precisely why it is essential to initiate an investigation".¹⁵

13. The Victims reiterate that they are most anxious for the investigation to start, and for no further time to be wasted on more preliminary matters. The Pre-Trial Chamber's decision has given the Victims genuine hope that the Prosecutor will reassess her decision in light of all of the available evidence. They are greatly dismayed that the Prosecutor has instead sought to stall further the investigation of this case.

¹² Comoros Application to dismiss in limine, para. 12 citing Decision on the admissibility of the 'Appeal Against Decision on Application Under Rule 103' of Ms Mishana Hosseinioun of 7 February 2012, ICC-01/11-01/11-74, 9 March 2012, para. 11 and Decision on the admissibility of the 'Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence'', ICC-01/09-78, 10 August 2011, para. 17.

¹³ Application Concerning the Participation of Victims in the Review Proceedings pursuant to Article 53(3)(a), ICC-01/13-7-Anx1, 19 February 2015, para. 20.

¹⁴ See, Situation on Registered Vessels of Comoros, Greece and Cambodia, Prosecution Article 53(1) Report, ICC-01/13-6-AnxA, 6 November 2014, para. 39.

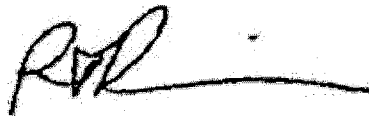
¹⁵ Victim Observations pursuant to 'Decision on Victims' Participation' of 24 April 2015, ICC-01/13-28-Red, 22 June 2015, para. 9. See also, paras. 10, 11, 13, 14, 51.

14. The Victims, therefore, ask the Appeals Chamber to make clear as quickly as possible that the purported appeal is without any proper legal foundation, as has been previously found by the Appeals Chamber, and to dismiss it immediately. The Prosecutor can then get on with her primary task of considering the evidence and investigated the crimes that have been committed against the Victims.

III. CONCLUSION

15. For all of the reasons herein, the Victims represented by the Legal Representatives urge the Appeals Chamber to find that the Prosecution has improperly submitted its appeal under Article 82(1)(a) and that it is therefore inadmissible. The Victims respectfully request that the Appeals Chamber dismiss the Prosecution's appeal *in limine*.

Word Count: 1956¹⁶



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Legal Representatives for Victims

Dated 19 August 2015

London

¹⁶ The Victims hereby make the required certification: ICC-01/11-01/11-565 OA6, para.32.