

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **26 November 2018**

PRE-TRIAL CHAMBER I

**Before: Judge Peter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Alapini-Gansou**

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

Public Document

Response on behalf of the Victims to the Prosecution's "Request for Leave to Appeal the 'Decision on the Application for Judicial Review by the Government of the Union of the Comoros'"

Source: Rodney Dixon QC, and Stoke White Ltd (London), Legal Representatives of the Victims

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

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Ms. Fatou Bensouda, Prosecutor

Counsel for the Defence

Legal Representatives of Victims
Mr. Rodney Dixon QC
Ms. Paolina Massidda

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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Mr. Rodney Dixon QC

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Victims of the attack on the Gaza Freedom Flotilla who are represented by the Legal Representative for Victims, Rodney Dixon QC, hereby respond to the Prosecution's Request for Leave to Appeal pursuant to Article 82(1)(d)¹ against the Pre-Trial Chamber's "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros.'"² This Response is filed pursuant to Regulation 65(3) and Regulation 33 of the Regulations of the Court.
2. The Victims submit that the request for leave to appeal should be dismissed. The request not only fails to satisfy the requirements of Article 82(1)(d), but also raises serious concerns for the Victims that the Prosecution is again seeking to disregard the decision of the Pre-Trial Chamber and *further* delay reconsideration of the OTP's decision not to investigate the Victims' allegations in accordance with the Chamber's order of 16 July 2015.

II. The Victims' Submissions and Concerns

3. During the course of the proceedings, over 400 victims have been accepted by the Victims Participation and Representation Section (VPRS) to participate in the ICC proceedings - 378 of these Victims are represented by the Legal Representative for Victims. This submission opposing the Prosecution request for leave to appeal is made on behalf of these Victims.³
4. The Victims represented by the Legal Representative for Victims were notified of the Pre-Trial Chamber's Decision of 15 November 2018 on the Government of the Comoros's Application for Judicial Review, and thereafter of the Prosecution's Request of 21 November for Leave to Appeal the Pre-Trial Chamber's Decision. The Legal Representative for Victims has received responses to both documents.

¹ Request for Leave to Appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'", ICC-01/13-69, 21 November 2018 [*hereinafter* OTP Leave to Appeal].

² Decision on the "Application for Judicial Review by the Government of the Union of the Comoros", ICC-01/13-68, 15 November 2018 [*hereinafter* PTC Decision on Judicial Review].

³ Decision on Victims' Participation, ICC-01/13-18, 24 April 2015. See also, Decision on the Request for an Extension of Time, ICC-01/13-60, 2 March 2018.

5. The Victims overwhelmingly welcome the Chamber's order to the Prosecutor to reconsider her decision in a timely fashion. The ICC represents their last hope for justice. The Victims have consistently sought accountability for the crimes and violations they suffered eight years ago, only to be turned away. Every attempt they have made as Victims to seek answers, tell their story and find the truth has been denied. As previously set out, this has included the dismissal of investigations and proceedings sought by individuals or groups of Victims in the domestic jurisdictions of Israel and Turkey.⁴
6. The Victims have turned to the ICC as the forum of last resort, when States fail to meet their obligations or guarantee the rights of Victims. They rely on the ICC's mandate of closing the impunity gap and holding those most responsible to account.
7. Following the Pre-Trial Chamber's Decision on 15 November, many Victims expressed that the decision renewed their hope that there was still a chance to find out the truth of what happened during the attack on the Flotilla. For example, Professor Ahmed Dogan, who is a registered ICC victim and the father of Furkan Dogan, the American teenager who was executed by the IDF on the Mavi Marmara at the age of 17 while he tried to film the attack, stated that:

“This is a monumental day for the victims of the attack. The decision is a positive step forward towards achieving justice for the tragic crimes suffered. The victims and their families have been struggling for many years to achieve accountability for what happened, only to be turned away at every stage. The ICC truly represents our last hope for justice”.

8. The Victims also highlight the importance of the Chamber's order which set a deadline of six months for the Prosecution to reconsider its decision. This order is invaluable to upholding the rights of the Victims, given that the Chamber stressed the *“internationally recognized human rights of victims ... to know the truth, to have access to justice and to request reparation”* and the prejudice they experienced from not being *“informed promptly as to whether or not they will be in a position to exercise their rights before this Court.”*⁵

⁴ See, for example, Victim Observations pursuant to “Decision on Victims’ Participation” of 24 April 2015, ICC-01/13-28-Red, 22 June 2015, para. 7; Victims’ Response to the Application for Judicial Review by the Government of the Union of the Comoros, ICC-01/13-65, 29 March 2018.

⁵ PTC Decision on Judicial Review, para. 120.

9. The Situation has been open before the Court since May 2013 when the Government of the Comoros referred it to the Court. The Victims have thus been waiting for over five years just to know whether their cases will be investigated. They are heartened that a deadline has now been set by the Court for them to know the OTP's reconsideration decision in light of the clear errors the Chamber has identified in its decision of 16 July 2015. This deadline should not be changed or delayed. There is no basis for leave to appeal to be granted.
10. The Victims are most concerned by the Prosecution's continued resistance to abide by the Orders of the Pre-Trial Chamber.
11. The Victims highlight that the ICC Statute and jurisprudence of the Court⁶ provide for a strict test and very high threshold for granting applications for leave to appeal under Article 82(1)(d). The Prosecution must identify an appealable issue,⁷ and demonstrate that the issue "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial," and that an immediate resolution of such issue by the Appeals Chamber may "materially advance the proceedings".⁸
12. The Victims submit that the Prosecution has failed to meet the requirements of this test. The OTP has not identified any appealable issues and instead again questions the "distribution of authority between the Pre-Trial Chamber and the Office of the Prosecutor"⁹, the "supervisory role of the Pre-Trial Chambers over the Prosecutor's actions"¹⁰ and the obligation of the Prosecutor to comply with Orders of the Chamber.¹¹

⁶ See, for example, *Prosecutor v. Lubanga*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-02/04-168, 13 July 2006; *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005; *Prosecutor v. Saif Gaddafi et al.*, Decision on the "Request for Leave to Appeal against the 'Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi'", ICC-01/11-01/11-490, 11 December 2013.

⁷ *Prosecutor v. Lubanga*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-02/04-168, 13 July 2006, paras. 9, 10 citing Rome Statute, Article 82(1)(d).

⁸ Rome Statute, Article 82(1)(d). See also, *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 20, 21.

⁹ PTC Decision on Judicial Review, para. 86.

¹⁰ PTC Decision on Judicial Review, para. 98.

¹¹ PTC Decision on Judicial Review, paras. 96-109.

13. The proposed issues raised by the OTP directly challenge the powers of the Chamber to supervise the actions of the Prosecution, and simply contradict and disagree with the Chamber's findings.
14. The Prosecution suggests in its application for leave that the Pre-Trial Chamber was mistaken in finding that it "set aside the Chamber's decision", and argues that the "issues identified by the Pre-Trial Chamber were not in fact disregarded".¹² This assertion is shown to be false by the fact that the Prosecution clearly stated in its decision that was reviewed that "[b]ased on its independent analysis of the law, the Prosecution cannot concur with the majority" and disagrees with the legal reasoning of the Chamber, and therefore "must consider these matters afresh and cannot simply follow" the Chamber's approach¹³; an argument which was wholly rejected by the Pre-Trial Chamber.¹⁴
15. The Prosecution's argument completely misses the point. The Pre-Trial Chamber held that the Prosecution cannot refuse to abide by the decisions of the Chamber.¹⁵ Ultimately it is for the OTP to decide whether to open an investigation or not, but the OTP is obliged to comply with the Chamber's Orders in undertaking this process. The errors identified through the judicial review procedure must be addressed by the OTP. The three proposed issues for appeal constitute no more than the Prosecution again challenging the power of the Chamber to interpret the law and review the actions of the Prosecution, and therefore no more than "mere disagreement or conflicting opinion" which "may not constitute issues" appealable under Article 82(1)(d).¹⁶
16. The Victims also contend that none of these issues significantly affect the fair and expeditious conduct of the proceedings (or any trial) to justify the granting of appellate review. The Victims note that the Prosecution argues that the three issues raised affect the "proper allocation of resources" and "duration and effectiveness of proceedings which is central to the concept of 'expedition.'"¹⁷ The issues raised by the Prosecution are not only

¹² OTP Leave to Appeal, note 23.

¹³ Notice of Prosecutor's Final Decision under Rule 108(3), Annex 1, ICC-01/13-57-Anx1, 30 November 2017, para. 13.

¹⁴ PTC Decision on Judicial Review, paras. 96-109.

¹⁵ See, PTC Decision on Judicial Review, para. 100.

¹⁶ Prosecutor v. Saif Gaddafi et al., Decision on the "Request for Leave to Appeal against the 'Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi'", ICC-01/11-01/11-490, 11 December 2013, para. 5.

¹⁷ OTP Leave to Appeal, paras. 16, 17.

mere disagreement with the Chamber, but they will in fact undermine the fair and expeditious conduct of the proceedings. Further consideration of the proposed issues again raised by the Prosecution (for a second time) would be grossly unfair to the Victims, and would result in even further delays in the conduct of the proceedings.

17. Since the situation was referred to the Court in 2013, and during the Prosecution's consideration of this matter, the Victims have sought to assist the Prosecution with the provision of relevant information and evidence, including reports from two experts.¹⁸ In all this time, the OTP could have by now actually investigated the case.
18. The Victims are surprised that the Prosecution believes that the re-litigation of the same legal arguments decided by the Pre-Trial Chamber would "materially advance" the proceedings. Granting leave to appeal on these issues, about which the Pre-Trial Chamber also already made clear findings, would only result in elongating the proceedings even further. The Victims submit that the Prosecution must immediately begin reconsidering its decision not to investigate, "in accordance with the decision issued by the Pre-Trial Chamber" of 16 July 2015.¹⁹
19. For over five years, the Victims have waited for the Prosecution to properly consider whether an investigation should be opened at the ICC, and "whether or not they will be in a position to exercise their rights before this Court."²⁰ The Victims submit that the issues raised by the Prosecution neither affect the fair and expeditious conduct of the proceedings, nor would materially advance the proceedings if considered by the Appeals Chamber – they would only work to delay the case and further prejudice the rights of the Victims.

Conclusion

20. For the reasons set out above, the Victims respectfully request that the Chamber find that the Prosecution has not met the strict requirements of Article 82(1)(d), and dismiss the Prosecution's request for leave to appeal.

¹⁸ Application for Judicial Review by the Government of the Union of the Comoros, ICC-01/13-58-Red, 23 February 2018, paras. 102-131.

¹⁹ PTC Decision on Judicial Review, para. 109.

²⁰ PTC Decision on Judicial Review, para. 120.

21. The Prosecution should waste no further time and immediately begin reconsidering its decision in accordance with the Chamber's decision of 16 July 2015.



Rodney Dixon QC

Legal Representative of the Victims

Dated 26 November 2018

London