

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: **ICC-01/13 OA 2**

Date: **4 March 2019**

**THE APPEALS CHAMBER**

**Before:** Judge Solomy Balungi Bossa, Presiding Judge  
Judge Chile Eboe-Osuji  
Judge Howard Morrison  
Judge Piotr Hofmański  
Judge Luz del Carmen Ibáñez Carranza

**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 Appeal Brief”**

**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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**Victims Participation and Reparations  
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**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 file this response to the “Prosecution Appeal Brief”<sup>1</sup> pursuant to Regulations 24(2), 33 and 34(b) and (c) of the Regulations of the Court, and in accordance with the Appeals Chamber’s “Decision on the Prosecutor’s request for extension of page limit and extension of time limit.”<sup>2</sup>
2. For all of the reasons set out below, the Victims submit that the Prosecution has failed to demonstrate that the Pre-Trial Chamber has committed any discernable errors within its second decision on reconsideration of 15 November 2018.<sup>3</sup> Instead, the OTP’s appeal is riddled with arguments that are baseless, irrelevant and in many instances baffling. They are decidedly disrespectful to the genuine interests and concerns of the Victims.
3. The OTP’s appeal submissions are characterised, as they always have been over several years since this preliminary examination commenced, by a marked determination to evade investigating the very serious crimes committed against the Victims on board of the Gaza Freedom Flotilla. Even when the Judges have identified clear errors made by the Prosecution in this elongated procedure, the OTP has taken the stubborn view that it can defy the Judges and proceed as if no errors at all had been identified by the Chamber.
4. This is a matter of the gravest concern to the Victims who seek justice. In participating in the current preliminary examination and proceedings, this not what they expected from the Prosecutor who is mandated to pursue those who are responsible for their suffering.

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<sup>1</sup> Prosecution Appeal Brief, ICC-01/13-85, 11 February 2019 [*hereinafter* “OTP Appeal Brief”].

<sup>2</sup> Decision on the Prosecutor’s request for extension of page limit and extension of time limit, ICC-01/13-80, 25 January 2019, para. 80.

<sup>3</sup> Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”, ICC-01/13-68, 15 November 2018, para. 117 [*hereinafter* “PTC’s Second Decision on Reconsideration”].

5. In consulting with Victims, they have resoundingly expressed their alarm at the OTP's concerted efforts to flout the Chamber's findings, and to continue to do so through the present appeal proceedings. Certain of the most pertinent views provided by Victims have been included in this submission.
6. The Victims therefore urge the Appeals Chamber to reject the Prosecution's appeal in its entirety, and to ensure that the Prosecution immediately reconsiders its decision not to open an investigation in accordance with the Pre-Trial Chamber's decision of 16 July 2015 by the deadline set by the Chamber of 15 May 2019.<sup>4</sup>

## **II. Certified Grounds of Appeal**

7. In the submission of the Victims the Prosecution has not complied with the Pre-Trial Chamber's decision on the grounds of appeal that have been certified. It has in effect included a ground of appeal for which the Pre-Trial Chamber rejected leave to appeal, and has also impermissibly redefined, and strayed beyond the scope of, the remaining two grounds for which certification was granted by the Pre-Trial Chamber.
8. In its decision on leave to appeal of 18 January 2019,<sup>5</sup> the Pre-Trial Chamber addressed three issues in the Pre-Trial Chamber's 15 November 2018<sup>6</sup> Second Decision on Reconsideration for which the Prosecution sought leave to appeal.<sup>7</sup> The three issues identified by the Prosecution were:
  - First Proposed Issue: *“Whether the Pre-Trial Chamber may entertain and rule upon the merits of further requests for reconsideration under article 53(3)(a) of*

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<sup>4</sup> PTC's Second Decision on Reconsideration, para. 121.

<sup>5</sup> Decision on the Prosecutor's request for leave to appeal the “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’”, ICC-01/13-73, 18 January 2018 [*hereinafter* “Decision on Leave to Appeal”].

<sup>6</sup> Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”, ICC-01/13-68, 15 November 2018, para. 117.

<sup>7</sup> 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 Application for Leave to Appeal”].

*the Statute, once the Prosecutor has formally notified the Pre-Trial Chamber of her final decision not to initiate an investigation under rule 108(3).”<sup>8</sup>*

- Second Proposed Issue: *“Whether and under what circumstances the Pre-Trial Chamber may set aside the conclusion and reasons of the Prosecutor—her final decision not to initiate an investigation—once it has been formally notified to the Pre-Trial Chamber under rule 108(3).”<sup>9</sup>*
- Third Proposed Issue: *“Whether the Prosecutor, in carrying out a reconsideration under article 53(3)(a) of the Statute and rule 108, is obliged to accept particular conclusions of law or fact contained in the Pre-Trial Chamber’s request, or whether she may continue to draw her own conclusions provided that she has properly directed her mind to these issues.”<sup>10</sup>*

9. In its decision on leave to appeal, the Pre-Trial Chamber rejected the Prosecution’s first proposed issue on appeal, which sought to challenge whether the Pre-Trial Chamber has the power to consider a second request for judicial review by a State Party under Article 53(3)(a). The Pre-Trial Chamber found that “the Prosecutor’s proposed issue constitutes a disagreement with the Chamber’s analysis” and is “is too broadly phrased”, and therefore cannot be recognised as an appealable issue.<sup>11</sup>
10. As a result, the Prosecution’s Appeal Brief should not focus on this issue or request the Appeals Chamber to decide it. Yet, as explained below, this is exactly what the OTP has done throughout its brief.
11. The Pre-Trial Chamber granted leave for the Prosecution’s second proposed issue but in doing so exercised “its discretionary power to reformulate appealable issues”<sup>12</sup>

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<sup>8</sup> OTP Application for Leave to Appeal, para. 9.

<sup>9</sup> OTP Application for Leave to Appeal, para. 11.

<sup>10</sup> OTP Application for Leave to Appeal, para. 13.

<sup>11</sup> Decision on Leave to Appeal, para. 35.

<sup>12</sup> Decision on Leave to Appeal, paras. 38-45.

and rephrased the issue to reflect “the Chamber’s understanding of the issue.”<sup>13</sup> In reformulating the issue for appeal, the Pre-Trial Chamber specifically added for consideration, the impact of the Prosecution’s failure to conduct its reconsideration in accordance with the directions of the Pre-Trial Chamber on the errors identified and the correct interpretation of the law, and whether this failure, in particular, means that the Prosecution’s decision on reconsideration cannot be considered as ‘final’.

12. Thus, the first issue before the Appeals Chamber, as granted and rephrased by the Pre-Trial Chamber, and which must be the basis for the Prosecution’s Appeal, is:

*“Whether the Pre-Trial Chamber may find that a decision by the Prosecutor further to a request for reconsideration pursuant to article 53(3)(a) of the Statute cannot be considered to be final within the meaning of rule 108(3) of the Rules of Procedure and Evidence in circumstances in which the Prosecutor has not, in the view of the Pre-Trial Chamber, carried out her reconsideration in accordance with the aforementioned request”<sup>14</sup>*

13. The Pre-Trial Chamber also granted leave for the Prosecution’s third issue<sup>15</sup> - the second issue before the Appeals Chamber should therefore be:

*“Whether the Prosecutor, in carrying out a reconsideration under article 53(3)(a) of the Statute and rule 108, is obliged to accept particular conclusions of law or fact contained in the Pre-Trial Chamber’s request, or whether she may continue to draw her own conclusions provided that she has properly directed her mind to these issues.”<sup>16</sup>*

14. The Victims submit that the OTP has not stayed within the four corners of these two grounds as specified by the Chamber. It has redefined the issues at its whim and proceeded to address the ground for which leave was not granted through these two grounds. The OTP has again acted as if there was no order from the Chamber. For this reason alone, the present appeal should be dismissed.

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<sup>13</sup> Decision on Leave to Appeal, paras. 38-45.

<sup>14</sup> Decision on Leave to Appeal, para. 39.

<sup>15</sup> Decision on Leave to Appeal, paras. 46-52.

<sup>16</sup> OTP Application for Leave to Appeal, para. 13.

15. In the event that the Appeals Chamber does consider the arguments raised in the OTP's appeal brief, the Victims submit that none of these arguments constitute valid grounds of appeal. For the reasons submitted below, they should all be rejected. They undeniably do not demonstrate that the Chamber's decision that is under appeal contains any errors at all that could be considered by the Appeals Chamber.
16. In responding to the Prosecution's appeal brief, the Victims note that the Prosecution has presented its revised 'grounds of appeal' in reverse order "from the order in which they were certified."<sup>17</sup> For this reason, the Victims will respond to the Prosecution's submissions in that order.

**III. First Issue: The Prosecution must follow the Pre-Trial Chamber's findings in judicial review proceedings, when reconsidering its decision not to investigate**

17. In its appeal brief, "the Prosecution submits that the Pre-Trial Chamber erred in law in requiring the Prosecutor to accept the reasoning contained in its article 53(3)(a) request, including particular conclusions of law or fact,"<sup>18</sup> asserting that when reconsidering its decision, the Prosecution need not follow the decision of the Chamber because "the Prosecutor cannot be obliged by it to accept particular conclusions of law or fact."<sup>19</sup>
18. The OTP is essentially arguing that it need not address the errors of law and fact that the Chamber concluded (in the judicial review proceedings) had been committed by the OTP. And therefore that the Chamber erred in finding that the OTP should address these errors in the decision that is under appeal. The Victims' submission is that there can be only one answer: the OTP is plainly not at liberty to refuse to address the errors identified by the Chamber in judicial review proceedings. That position does not in any way undermine the independence of the Prosecutor to ultimately

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<sup>17</sup> OTP Appeal Brief, para. 8.

<sup>18</sup> OTP Appeal Brief, para. 12.

<sup>19</sup> OTP Appeal Brief, para. 12.

decide whether to open an investigation – that is her sole prerogative. It properly respects the authority and primary judicial function of the Judges. It certainly guarantees the interests of the Victims to be heard on the issues that directly affect them which can be taken into account by the Chamber in deciding whether the OTP has acted lawfully, rationally and fairly in accordance with well-established principles of judicial review.

19. The OTP has cobbled together a series of repetitive arguments to try to support the thrust of its appeal, namely that there is no power of judicial review which requires the OTP to have to consider and correct the errors of law and fact identified by the Chamber. Each of these arguments is clearly misguided, and none of them establishes that the Pre-Trial Chamber has committed any errors.

***Process versus Result misunderstood***

20. Central to the Prosecution’s submission is the proposition that it is “subject to an obligation of *process*” but “not subject to an obligation of *result*.”<sup>20</sup> The OTP has turned this proposition on its head to suit its purpose of avoiding the Chamber’s findings.
21. There is indeed *no* obligation created by the Chamber on the OTP to open an investigation. That would be an encroachment on the OTP’s proper functions and independence. But equally it is wrong for the OTP to claim that in the *process* of reconsideration it can ignore the Chamber’s findings in the judicial review proceedings. That would usurp the Chamber’s proper functions and essential judicial role.
22. The Pre-Trial Chamber specifically confirmed in terms that having identified errors which must be considered and corrected, “*the Prosecutor’s obligation to comply with the 16 July 2015 Decision does not entail an obligation as to the result of the*

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<sup>20</sup> OTP Appeal Brief, para. 22.



*reconsideration.*”<sup>21</sup> The Pre-Trial Chamber has never demanded a certain conclusion from the Prosecution on whether to open an investigation or not, and has never said that it has the right to dictate this *result*. The Chamber has clearly not erred in its approach to the judicial review proceedings.

23. The Pre-Trial Chamber has rightly preserved the judicial and supervisory role of the Judges under Article 53(3)(a)<sup>22</sup> to interpret the law to be applied during the *process* of the OTP’s reconsideration, which clearly permits the Prosecution to apply the law and assess and weigh the facts under the law, as interpreted by the Chamber, in order to reach *its own result* or conclusion on whether to open an investigation.
24. This is precisely what the Appeals Chamber has stated: the ultimate “decision” on whether to open an investigation or not “is for the Prosecutor.”<sup>23</sup>
25. It is of course not for the Victims to decide whether to open an investigation, but the rights of Victims are legitimately preserved through their participation in judicial review proceedings in which the Judges may find that the OTP has committed errors of law and fact that must be addressed (as the Pre-Trial Chamber has correctly held).
26. Accordingly, for example, where the Chamber finds that the OTP has committed an error in not taking relevant evidence into account in its decision (such as particular victim evidence), it is incumbent on the OTP to address and correct that error by properly considering that evidence. It is then for the OTP to make the ultimate decision in light of addressing that error about whether to open an investigation. In other words, as rightly found by the Chamber, the reconsideration process must be undertaken in accordance with the Chamber’s decision on the application for judicial review.

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<sup>21</sup> PTC’s Second Decision on Reconsideration, para. 109.

<sup>22</sup> See, PTC’s Second Decision on Reconsideration, para. 98.

<sup>23</sup> Decision on the admissibility of the Prosecutor’s appeal against the ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’, ICC-01/13-51, 6 November 2015, para. 56.

*Interpreting the law is the province of the Judges*

27. The Prosecution is in fact attempting to move the goalposts to assign unilaterally to itself the authority to decide whether the errors identified by the Chamber are indeed errors or not.<sup>24</sup> In so doing, the OTP claims that it can disagree with the Chamber's findings on the law, and need not follow such findings.

28. Indeed, the Prosecution makes clear that it is attempting to subsume the judicial role of interpreting the law asserting that:

- The Prosecutor should not be “required to reach the same factual and legal conclusions as the” Pre-Trial Chamber during its reconsideration;<sup>25</sup>
- The Chamber's “apparent view that it is inherent in such a judicial decision that its reasoning must be binding upon the Prosecutor is incorrect”;<sup>26</sup> and,
- To require “the Prosecutor to conduct a further reconsideration ‘in accordance with’ the ‘five main errors’ identified” by the Chamber is “ultra vires”.<sup>27</sup>

29. As the Pre-Trial Chamber has found with full justification, the ICC legal system cannot permit the OTP to ignore the legal findings of the Judges on the applicable law, whenever it so chooses. The Victims wish to stress that such an entirely untenable position would signal the disintegration of the Court, and should be roundly rejected.

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<sup>24</sup> OTP Appeal Brief, para. 18.

<sup>25</sup> OTP Appeal Brief, para. 18.

<sup>26</sup> OTP Appeal Brief, paras. 20, 21.

<sup>27</sup> OTP Appeal Brief, para. 17.

***The authority of the Pre-Trial Chamber's role in judicial review proceedings***

30. The Prosecution seeks to undercut the authority of the Chamber's decision by arguing (without any authority) that "article 53(3)(a) 'requests' have a particular character which precludes the possibility that their *reasoning*, including conclusions of law or fact, may bind the Prosecutor in subsequently carrying out her 'reconsideration.'"<sup>28</sup> In other words, the Prosecution seeks to categorise the Chamber's rulings on the errors to be addressed and the legal standards to be followed as merely advisory, which the Prosecution is free to disregard whenever it so elects.

31. These claims are demonstrably flawed, as the Victims have highlighted, for example they have stated:

- *"I am appalled at the Prosecutor's disdain of the 16 July 2015 decision by the Pre-trial Chamber and its subsequent 15 November 2018 decision as well."*<sup>29</sup>
- *"It is my understanding that the Judges have the right to tell the prosecutor when errors have been made because they have the interests of the victims at the forefront of their concerns, as is the constitution of the court."*<sup>30</sup>

32. In consulting with the Victims to receive their observations on the Prosecution's Appeal, they have expressed overwhelming confusion as to why the Prosecution is not following the directions clearly provided by the Judges. They were deeply concerned that the Prosecution's "blatant disregard" for the decision of the Chamber undermines the authority and Statute of the Court. They explained that they were "bewildered" that the OTP took the view it could do as it pleased.

***The Chamber is not 'militating' a conclusion on opening an investigation***

33. The Prosecution claims that "article 53(1)(b) is a law-driven analysis", and that if the Prosecution is bound by the Chamber's interpretation of the law, the Prosecution will

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<sup>28</sup> OTP Appeal Brief, paras. 20, 22.

<sup>29</sup> Victim a/05092/14.

<sup>30</sup> Victim a/40006/13.

have “no residual discretion” to make the conclusion it wants.<sup>31</sup> The Prosecution argues that, in essence, this would mean that the Chamber would be “militating” a conclusion on whether to open an investigation.<sup>32</sup>

34. This is a hollow claim. As the Pre-Trial Chamber has properly found, the decision on opening an investigation is the Prosecutor’s sole responsibility. The process of arriving at that decision must of course be undertaken in accordance with the applicable law as establishing in judicial review proceedings. There would be no point in conducting such proceedings if the Prosecutor could simply ignore their outcome.
35. In arguing that the Pre-Trial Chamber should not be the final arbiter of the interpretation of the law, the Prosecution has raised that the Pre-Trial Chamber did not have access to all the “available information” and documents in the Situation; including over 350 Victim applications and statements.
36. There is no force at all in this argument. Clearly, it is not necessary for the Judges to have all access to all the evidence in the case in judicial review proceedings, and in order to make findings on the applicable law.

***OTP’s persistent refusal to address and correct its errors***

37. The Victims wish to convey their growing apprehension at the OTP’s unabashed refusal to address and correct the errors it has committed in the preliminary examination. They have sought to cooperate fully in good faith with the OTP’s inquiries and in all the proceedings. Yet the OTP has not reciprocated and undertaking its role fairly and impartially.

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<sup>31</sup> OTP Appeal Brief, para. 16.

<sup>32</sup> OTP Appeal Brief, para. 16.

38. One Victim stated that:

*“When I heard the Judges had asked for these errors to be addressed I felt very hopeful that the crimes that were committed would be investigated, especially because, by the Prosecutor’s own opinion, there was a reasonable basis to believe that war crimes had been committed during the attack on the flotilla. When the Prosecutor continues to resist opening the case it feels like a denial of justice, because she is trying to find a way to avoid opening the case by arguing about the process rather than assessing the substance of the case. In other words, the investigation of the deaths and injuries caused by the interception of the flotilla by the Israeli military seem less important to the Prosecutor than her defence of her own argument.”<sup>33</sup>*

39. The Prosecution’s arguments have had a profound affect on the Victims’ perception of the independence and integrity of the Office. One Victim, for example, stated:

- *“We feel the Prosecutor’s refusal to open an investigation goes against the clear legal facts put in front of her.”*
- *“We are profoundly concerned that the Prosecutor is facing unprecedented external pressure.”<sup>34</sup>*

40. Other Victims have stated that they could not understand why the Prosecution, or any other party, would appear to block investigative processes if they *“truly have no fear of the facts, the evidence and the truth being uncovered.”*

41. The Victims have expressed their surprise at the OTP’s hesitation simply to investigate what happened, for example:

- *“When such a grave attack took place, when civilians from different countries were killed and injured on international waters, when we were taken hostage, I believe that to hold an investigation about the matter should not even be debated. I believe we have the rights to be heard.”<sup>35</sup>*
- *“ICC as an international court should deliver justice by conducting a thorough investigation by directly listening to the statements of the*

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<sup>33</sup> Victim a/40006/13.

<sup>34</sup> Victim a/40006/13.

<sup>35</sup> Victim a/05075/14.

*participates who were victimized” ... “Because only by listening to the participants directly can facts be opened and justice can be served.”<sup>36</sup>*

42. The Victims submit that the Prosecution’s arguments on appeal are without any merit, and are designed to make the Prosecutor unaccountable to anyone in preliminary examinations. This would plainly have adverse consequences for the Victims and their rights if the OTP could brush aside at whim any findings made by the Judges in judicial review proceedings (in which the Victims had participated). The OTP’s appeal should accordingly be dismissed in its entirety.

**IV. Second Issue: The Prosecution’s decision on reconsideration cannot be considered ‘final’ if it is not undertaken in accordance with the Pre-Trial Chamber’s decision in the judicial review proceedings**

43. As noted above, the Pre-Trial Chamber granted the Prosecution leave to appeal on a second issue and reformulated the appealable issue to the following: whether the Prosecution decision on reconsideration can be considered final when it fails to carry out the reconsideration in accordance with the Chamber’s decision in the judicial review proceedings.<sup>37</sup>

44. In response the Prosecution in its Appeal Brief asks the Appeals Chamber to reverse the Pre-Trial Chamber’s Second Decision on Reconsideration of 15 November 2018 “because it is *ultra vires*”; arguing that the “Pre-Trial Chamber was not competent to entertain the Comoros’ further request for reconsideration, and any decision by it other than dismissal *in limine* was thus wrong in law.”<sup>38</sup>

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<sup>36</sup> Victim a/05077/14

<sup>37</sup> Decision on Leave to Appeal, paras. 38-45.

<sup>38</sup> OTP Appeal Brief, para. 74.

***Impermissible arguments on the appeal issue rejected by the Chamber***

45. As noted above, the Pre-Trial Chamber specifically rejected the Prosecution’s first proposed ground of appeal which sought to appeal “*Whether the Pre-Trial Chamber may entertain and rule upon the merits of further requests for reconsideration under article 53(3)(a) of the Statute, once the Prosecutor has formally notified the Pre-Trial Chamber of her final decision not to initiate an investigation under rule 108(3).*”<sup>39</sup>
46. The Victims submit that the arguments advanced by the Prosecution impermissibly address this rejected ground of appeal, and unacceptably invite the Appeals Chamber to make a determination on whether the Pre-Trial Chamber “*may entertain and rule upon the merits of further requests for reconsideration.*”<sup>40</sup> The OTP has explicitly requested the Appeals Chamber to find that the “*the Pre-Trial Chamber was not competent to entertain the Comoros’ further request for reconsideration*” and must be dismissed *in limine*.<sup>41</sup>
47. The Prosecution even admits that it is going beyond the decision on certification: “the Pre-Trial Chamber’s power of review under article 53(3)(a), and the meaning of rule 108(3), are still necessarily canvassed in this appeal.”<sup>42</sup> It goes on to directly ask the Appeals Chamber to make a determination on the very issue for which it was *not* granted certification by the Pre-Trial Chamber, stating that “Appeals Chamber cannot – and should not – refrain from” addressing whether the Chamber is competent to review the Prosecution’s decision on reconsideration.<sup>43</sup>
48. For these reasons, the Victims request that the Appeals Chamber dismiss the appeal on this basis alone.

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<sup>39</sup> Decision on Leave to Appeal, paras. 31-37.

<sup>40</sup> Decision on Leave to Appeal, paras. 31-37 (emphasis added).

<sup>41</sup> OTP Appeal Brief, para. 74 (emphasis added).

<sup>42</sup> OTP Appeal Brief, paras. 9-11.

<sup>43</sup> OTP Appeal Brief, paras. 9-11.

49. The arguments raised (if considered by the Appeals Chamber) are in any event completely unsubstantiated, and should be rejected.

***Misapplication of the word ‘final’ in Rule 108(3)***

50. The Prosecution, for example, argues that because Rule 108(3) uses the word ‘final’, its decision on reconsideration terminates the “Court’s jurisdiction over that situation”<sup>44</sup> and that the proceedings “at issue are deemed ... complete, without further ordinary recourse by the Parties,”<sup>45</sup> including further review by the Pre-Trial Chamber.

51. The Victims submit that this argument is manifestly wrong. A decision logically cannot be ‘final’ merely because the OTP states that it is final. It can only become final once it has addressed all the issues that it was required to consider and correct.

52. Although Rule 108 uses the words “final decision” to describe the Prosecution’s decision on whether or not to open an investigation, the rules, statute and regulations of the Court nowhere state that this ‘final decision’ is not reviewable if the decision continues to contain errors of law and fact which the Prosecution has failed to address.

53. As noted above, the Victims submit that the Prosecution is bound to follow and properly apply the Pre-Trial Chamber’s findings during the OTP’s *process* of reconsideration, and any failure to do so cannot be without recourse. The Appeals Chamber has recognised as much in noting that the Prosecutor must have “properly applied his or her mind” to the errors identified.<sup>46</sup>

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<sup>44</sup> OTP Appeal Brief, paras. 13, 52.

<sup>45</sup> OTP Appeal Brief, para. 106.

<sup>46</sup> Decision on the admissibility of the Prosecutor’s appeal against the ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’, ICC-01/13-51, 6 November 2015, footnote 134.



54. To argue that the Prosecution’s decision is ‘final’ and unreviewable regardless of the manner in which the Prosecution conducted its *process* of reconsideration, and even if during this *process* the Prosecution fails to follow the findings of the Pre-Trial Chamber on the correct interpretation of the law, would undermine the whole purpose of the judicial review proceedings.
55. These arguments by the Prosecutor have led one Victim to “*question what the ‘checks and balances’ are at the ICC, and what type of oversight is implemented (or rather not implemented) at the ICC to ensure people are held accountable to properly undertake their responsibilities?*”<sup>47</sup>
56. The Victims have underlined that it would make no sense to conclude that the Pre-Trial Chamber could provide directions on the correct interpretation of the law to be applied only for the Prosecution to be permitted to disregard these findings and adopt its own interpretation for the remainder of the preliminary examination and potential investigation.
57. The Victims have explained that they are “surprised”, “disappointed”, “appalled”, “outraged” and “extremely frustrated” by the arguments of the Prosecutor. They say this “*contributes to the perception that it [the OTP] is only interested in prosecuting selected cases, without fair and equal access to all cases*” and has “*a bearing on the confidence of victims to have their voices heard.*”<sup>48</sup>

***OTP’s duty to give reasons***

58. Rule 108(3) requires the OTP to give reasons for its reconsideration decision, in other words to explain the basis on which it addressed the errors raised in the Pre-Trial Chamber’s decision. As the Pre-Trial Chamber rightly found this confirms that the

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<sup>47</sup> Victim 1/05092/14.

<sup>48</sup> Victim a/40006/13.

Chamber's "oversight role is not necessarily terminated upon the Prosecutor's decision under rule 108(3) of the Rules."<sup>49</sup>

59. The Prosecution tries to argue that as a "decision-maker" itself, being required to provide details on how it conducted its reconsideration creates "no suggestion that it may necessarily be challenged further before the Court."<sup>50</sup>

60. However, the Victims wish to stress that the OTP is indisputably absolutely not an organ of the Court that can arrogate to itself judicial functions. Article 53(3)(a) of the Statute specifically assigns to the Pre-Trial Chamber the "judicial oversight role" of the Prosecution during Article 53 judicial review proceedings.<sup>51</sup> Nothing in the Statute, Rules or drafting history (referenced by the OTP) provides any basis at all to find that the OTP is an unaccountable organ in preliminary examinations in which a State Party has referred the Situation to the Court.

61. The Victims submit that the reasoning of the Pre-Trial Chamber is unassailably correct. Rule 108(3)'s requirement that the Prosecution provide details and reasons to the Pre-Trial Chamber on whether it faithfully implemented the Chamber's decision, can indeed be considered as an indication that the Pre-Trial Chamber's "oversight role is not necessarily terminated upon the Prosecutor's decision under rule 108(3) of the Rules". It clearly permits the Chamber to "remain apprised" of the Prosecution's justification and reasons on reconsideration.<sup>52</sup>

***The OTP is not a co-equal or superior decision-maker***

62. The Prosecution boldly asserts that the Pre-Trial Chamber has an "erroneous view of its own competence to determine the validity of the Prosecutor's decision."<sup>53</sup> Throughout its Appeal Brief, the Prosecution repeatedly maintains that it has the

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<sup>49</sup> PTC's Second Decision on Reconsideration, para. 116.

<sup>50</sup> OTP Appeal Brief, para. 107.

<sup>51</sup> PTC's Second Decision on Reconsideration, para. 98.

<sup>52</sup> PTC's Second Decision on Reconsideration, para. 116.

<sup>53</sup> OTP Appeal Brief, para. 17.

status of a co-equal or superior party to the Pre-Trial Chamber in these proceedings – designating the Pre-Trial Chamber as a “decision-maker” and the Prosecution as the “subsequent decision-maker.”<sup>54</sup>

63. The Victims submit that the Pre-Trial Chamber is entirely correct to reject the Prosecution’s attempts to act “as an appellate body reviewing the Chambers decision on the merits” so as to be “free to disagree with or ignore” the Chamber’s decision.<sup>55</sup>

64. Similarly, the Victims submit that the Prosecution’s assertion that as a fellow “decision-maker” there can be “difference[s] of opinion between the Pre-Trial Chamber and the Prosecutor” on the interpretation of the law to be applied is totally untenable.<sup>56</sup> The Prosecution gives the false reassurance that its difference of opinion would not effect “the reasoning in the [Chamber’s] request” with the “only procedural effect of the ‘final decision’” being the termination of the preliminary examination.<sup>57</sup> The OTP gives no consideration at all to the direct consequences that the closing of the case would have on the rights and interests of the Victims.

65. The Victims have thus emphasised in their communications that the OTP has again aggravated their grave concerns that it is determined to shut their case once and for all. As noted above, it echoes the disquiet expressed by a Victim that “*the investigation of the deaths and injuries caused by the interception of the flotilla by the Israeli military seems less important to the Prosecutor than her defence of her own argument.*”<sup>58</sup>

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<sup>54</sup> OTP Appeal Brief, paras. 37, 107.

<sup>55</sup> PTC’s Second Decision on Reconsideration, para. 98. See, OTP Appeal Brief, paras. 51-53.

<sup>56</sup> OTP Appeal Brief, paras. 52, 53.

<sup>57</sup> OTP Appeal Brief, para. 52.

<sup>58</sup> Victim a/40006/13.

***The distinction between Article 53(3)(a) and (b) is of no consequence***

66. The Prosecution also incorrectly argues that the distinction between Article 53(3)(a) and 53(3)(b)<sup>59</sup> demonstrates that the Pre-Trial Chamber has no power to review the Prosecution's decision on reconsideration.
67. The Prosecution improperly relies on an observation of the Appeals Chamber in its decision on the admissibility of the Prosecution's Article 82(1)(a) application, namely that "the distinction between the powers of the Pre-Trial Chamber under article 53 (3) (a) and (b) reflects a conscious decision on the part of the drafters to preserve a higher degree of prosecutorial discretion regarding decisions not to investigate."<sup>60</sup>
68. Clearly nothing in this observation can be read to entail that the OTP can ignore the errors identified by the Chamber in judicial review proceedings. The decision whether to investigate is obviously that of the Prosecutor alone (which it is not in the specific circumstances pursuant to Article 53(3)(b)), but it certainly does not follow that the Prosecutor can therefore disregard the outcome of judicial review proceedings.
69. The Victims submit that none of the arguments raised by the Prosecution carry any weight at all. They do not demonstrate that the Pre-Trial Chamber has erred in any way in its decision.

**V. The great significance of the ICC proceedings for the Victims**

70. It must be emphasised in conclusion that having consulted with the Victims about their views and concerns in relation to the Prosecution's Appeal Brief, it is evident

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<sup>59</sup> OTP Appeal Brief, paras. 102-105.

<sup>60</sup> Decision on the admissibility of the Prosecutor's appeal against the 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation', ICC-01/13-51, 6 November 2015, para. 59.

that the Victims view the ICC as a very last resort for justice, and the “*decent way to serve justice over what happened.*”<sup>61</sup> A Victim has stressed that:

*“The Rome Statute was written in order to give people like us a route to justice. ... I feel it is so important that this incident, and the deaths and injuries that occurred as a result of it, are given the chance to be investigated at the International Criminal Court. ... There was no need for us to be attacked. We posed no threat to Israel or anyone. Yet we were attacked and savagely, with violence, theft and deprivation of liberty. ... On behalf of all Mavi Marmara and Gaza Freedom Flotilla survivors I want to reiterate that we have only sought justice for the crimes committed on that fateful night.”*<sup>62</sup>

71. The overarching view is that Victims have had to wait for far too long to know if they will receive justice. And that without the ICC process, their cases would be forgotten and buried forever. The perpetrators would have succeeded in delaying the investigation for long enough and finally to get away with their criminal conduct. For example, Victims have said:

- *“After almost ten years following the attack, justice has yet been served.”*<sup>63</sup>
- *“It is also a blatant affront to the Chamber and its judges, and the ICC as a whole, that after the 16 July 2015 decision, and the subsequent 6 November 2015 Appeals Chamber decision, that the Prosecutor took more than two years till the 29 November 2017 to respond, as the Chamber correctly points out in Article 119 of its November 2018 decision. This is disrespectful not only to the Chamber, but also to the victims and their families, and seriously calls into question the ability of the Prosecutor to conduct her job professionally and with competence ... Clearly, this delay is inexcusable, and seems deliberate.”*<sup>64</sup>
- *“At this time, I have faith in the process of the court and I believe, because it is a court that listens to victims that our views will be taken into consideration.”*<sup>65</sup>

72. The Appeals Chamber is asked to take all of these views and interests into account in adjudicating this appeal. They highlight in the words of the Victims themselves

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<sup>61</sup> Victim a/05075/14.

<sup>62</sup> Victim a/40006/13.

<sup>63</sup> Victim a/05077/14.

<sup>64</sup> Victims a/05092/14.


<sup>65</sup> Victim a/40006/13.

the real poverty of the OTP's claims and attempts to evade confronting the errors it has committed in the preliminary examination, and the serious delays that has caused.

## **VI. Conclusion**

73. The Victims therefore urge that the Prosecution's appeal of the Pre-Trial Chamber's decision on reconsideration of 15 November 2018 is dismissed. The OTP has not complied with the Pre-Trial Chamber's order on certification. It argues that it need not comply with the Chamber's decisions in judicial review proceedings pursuant Article 53(3)(a). This submission is at its core indefensible, and should be rejected outright. The OTP has certainly not established that the Pre-Trial Chamber has committed any discernable errors.

74. In dismissing this appeal, the Appeals Chamber is invited to ensure that the Prosecution is required genuinely and fairly to reconsider its decision not to investigate the attacks on the Gaza Freedom Flotilla in accordance with the Pre-Trial Chamber's decision of 16 July 2015 by no later than 15 May 2019.<sup>66</sup>



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**Rodney Dixon QC**

**Legal Representative of the Victims**

Dated 4<sup>th</sup> March 2019

London

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<sup>66</sup> PTC's Second Decision on Reconsideration, para. 121.