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Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/13**
Date: **27 July 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

**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: Office of the Prosecutor

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

Court to:

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Introduction

1. The Office of the Prosecutor appeals Pre-Trial Chamber I's decision of 16 July 2015, requesting reconsideration of the Prosecutor's decision, pursuant to article 53 of the Rome Statute, not to initiate an investigation into the situation on registered vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia.¹
2. By its nature, the Decision constitutes a decision with respect to admissibility, which may be directly appealed under article 82(1)(a) of the Statute.
3. This appeal is necessary because the Decision erred in the standard of review applied, its interpretation of article 53(1), and the reasoning of its conclusions, which failed to address or mischaracterised relevant facts and arguments.
4. This appeal is important because the Decision not only purports to rule on the admissibility of any potential case(s) arising from this situation, but interprets the law in a manner that alters the Prosecution's mandate under the Statute and dramatically expands the scope of the Court's operations.
5. The Prosecution seeks to correct these errors, and to obtain a clear statement of the governing law. Given the near-constitutional importance of the Decision's implications, the Prosecution considers prompt judicial resolution of these matters essential.²

¹ 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 ("Decision"). Although the Prosecution was notified of the Decision on 16 July 2015, time for filing this notice did not run until Monday 20 July: *see* Regulations of the Court, reg.33(1)(c). Applying rule 154(1) of the Rules of Procedure and Evidence and regulation 33(1)(d), this notice is properly filed on this day.

² By analogy, *see e.g.* ICC-01/04-169-US-Exp OA (made public by ICC-01/04-538-PUB-Exp) ("*DRC Appeal Decision*"), para.54 (reasoning that, although certain matters need not strictly be addressed by the Appeals Chamber in the circumstances of that case, "the interpretation of article 17(1)(d) of the Statute by the Pre-Trial Chamber, if upheld, could have an impact on the Court as a whole", leading to the risk of "future cases" being wrongly decided).

6. To substantiate these assertions, the Prosecution slightly departs in this notice from its usual practice under regulation 64(1). To assist the Appeals Chamber and the Parties and participants—and given the novelty of this matter, and the associated public interest—it not only declares its intention to appeal, but explains why it considers this appeal to be admissible. It also introduces the grounds of appeal, and explains how the three errors go to the heart of the Decision’s reasoning on the gravity of any potential case(s) arising from this situation. Finally, it addresses the question of suspensive effect under article 82(3) of the Statute.

7. The submissions in this notice concerning the errors in the Decision are illustrative, and do not replace the arguments on the merits which will be contained in the Prosecution’s appeal brief,³ to which the Government of the Union of the Comoros and other participants will be entitled to make full response. No prejudice ensues from early notice of the Prosecution’s intended arguments.

Appeal pursuant to article 82(1)(a) of the Statute

8. The Decision is based on the Pre-Trial Chamber’s view, by majority, that any potential case or cases arising from this situation are admissible, in the sense that they are sufficiently grave to be heard before this Court.⁴ The majority is unequivocal

³ See Regulations of the Court, reg.64(2).

⁴ Decision, para.49 (concluding that the combination of five factors “materially affects the validity of the Prosecutor’s conclusion that the potential case(s) arising from the situation referred to her by the Comoros would not be of sufficient gravity to justify further action by the Court within the meaning of article 17(1)(d) of the Statute”). See further paras.24 (“there appears to be no reason [...] to consider that an investigation into the situation [...] could not lead to the prosecution of those persons who may bear the greatest responsibility”), 26 (the number of victims is “a compelling indicator of sufficient, and not of insufficient[,] gravity”), 30 (“there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment were committed” and this should be taken “into account [...] as part of the gravity test”), 45 (the Prosecution’s conclusion that there is no reasonable basis to believe alleged crimes were systematic or resulted from a deliberate plan or policy is “unsustainable”), 47 (“the significant impact of such crimes on the lives of the victims and their families [...] is, as such, an indicator of sufficient gravity”), 48 (“the Prosecutor should have recognised the possibility that the events at issue had an impact going beyond the suffering of the direct and indirect victims”).

about this conclusion,⁵ which is the essential premise and rationale underpinning the outcome of the Decision.⁶

9. Further underlining the Decision's nature as a ruling on gravity,⁷ the majority emphasised that admissibility under article 17 is an "exacting legal requirement[]" even when considered by the Prosecutor under article 53(1)(b)—and hence, *a fortiori*, in its own analysis.⁸ The majority characterised its own approach as "independent judicial oversight", affording no "field of deference" to the Prosecution's assessment.⁹ These observations justify appellate scrutiny of the Decision, on par with any other judicial ruling as to admissibility.

10. The centrality of the question of admissibility to the Decision is further illustrated by Pre-Trial Chamber I's approach in relevant procedural decisions,¹⁰ as well as the submissions of the Parties.¹¹

11. For these reasons, the Decision is similar to the decision of Pre-Trial Chamber I (then differently composed) in the *DRC* situation. In that case, the Pre-Trial Chamber declined to issue a warrant of arrest on the basis of its view that the case would be

⁵ See e.g. Decision, paras.24, 26, 30, 45, 47-48.

⁶ Reference to the majority's reasoning in this respect is not inconsistent with the Prosecution's view that such reasoning is legally erroneous: see below paras.15-27.

⁷ See also Decision, para.51 ("As a final note, the Chamber cannot overlook the discrepancy between [...] the Prosecutor's conclusion that the identified crimes were so evidently not grave enough to justify action by the Court [...] [and] the attention and concern that these events attracted from the parties involved [...]. The Chamber is confident that, when reconsidering her decision, the Prosecutor will fully uphold her mandate under the Statute").

⁸ Decision, para.14.

⁹ Decision, para.15.

¹⁰ See e.g. ICC-01/13-18, paras.7-10 (in deciding on the issue of victim participation, stating "As the Prosecutor has taken her decision referring to 'gravity under article 53(1)(b) in conjunction with article 17(1)(d) of the Statute, rule 107(5) of the Rules stipulates that rule 59 applies '[w]here an issue of jurisdiction or admissibility [...] is raised' in the context of an article 53(3)(a) review process. [...] The Chamber is of the view that both rules 92(2), and 107(5) together with rule 59 of the Rules, foresee the participation of all victims who have communicated with the Court in relation to the situation in question. Considering that the ground, upon which the Prosecutor's Decision rests, concerns 'gravity', an issue of admissibility within the meaning of rule 107(5) of the Rules, the Chamber considers rule 59 of the Rules to be *lex specialis* [...] This is without prejudice to any further determination of the Chamber on the merits").

¹¹ See e.g. ICC-01/13-29-Red ("Prosecution Response to Victims"), para.3 ("The issue is whether the gravity of this situation makes the Court the proper forum").

inadmissible.¹² The Appeals Chamber accepted an appeal on the basis of article 82(1)(a) because:

Although the impugned decision is a decision on an application for warrants of arrest, the decision by the Pre-Trial Chamber [...] was based on a ruling of the admissibility of the case [...] To this extent, the impugned decision is a decision ‘with respect to [...] admissibility,’ as required by article 82(1)(a) of the Statute.¹³

12. So too, in this case, is the Decision based on a ruling of admissibility.¹⁴ Just as the Appeals Chamber agreed in the *DRC* situation that a decision under article 58 may be a decision with respect to admissibility, the same has been suggested of a decision under article 15(4).¹⁵ The same logic applies *mutatis mutandis* to a decision under article 53(3)(a).¹⁶ Such a view has been left open for the Court.¹⁷

13. Conversely, the Decision differs markedly from those matters determined to have only “an indirect or tangential link” to jurisdiction or admissibility,¹⁸ falling outside the scope of article 82(1)(a).¹⁹ Likewise, the absence of an express reference to

¹² See *DRC* Appeal Decision, para.8. See further paras.56-65, 84.

¹³ *DRC* Appeal Decision, para.18.

¹⁴ See also ICC-01/09-78 OA (“*Kenya* Appeal Decision”), para.17 (referring to the “nature” of the decision).

¹⁵ See Staker, ‘Article 82: appeal against other decisions’, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd Ed. (München/Oxford/Baden-Baden: C.H.Beck/Hart/Nomos, 2008), p.1477, mn.7 (observing that “[t]he decisions appealable under subparagraph (a) would be primarily those under Part 2 of the Statute (articles 5-21)”, and citing examples including “decisions [...] under article 15 para. 4”). See also mn.8 (“subparagraph (a) is not necessarily confined to decisions taken under specific provisions of Part 2”).

¹⁶ Articles 15(4) and 53(3) are united in that both address the Pre-Trial Chamber’s power to assess, at the appropriate standard of review, the criteria of article 53(1)(a) to (c)—the former in the context of a situation identified *proprio motu* by the Prosecutor, and the latter in the context of a situation referred to the Prosecutor.

¹⁷ See Brady, ‘Appeal’, in Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, Transnational: 2001), pp.578-579 (observing that “[i]t is less clear” whether article 82(1)(a) applies to decisions under article 53(3)(a) “when that decision involves issues of jurisdiction or admissibility”, noting mixed views in the negotiations whether this should be elaborated in the Rules, but that “[t]he wording of article 82, paragraph 1(a) is capable of being interpreted so as to cover the Pre-Trial Chamber’s decisions under article 53, paragraph 3(a), when the decision involves jurisdiction or admissibility”).

¹⁸ See *Kenya* Appeal Decision, para.15.

¹⁹ Such matters included decisions on State cooperation, intervention as *amicus curiae*, and the detention of witnesses. See *Kenya* Appeal Decision, paras.18-20 (“To the contrary, the Pre-Trial Chamber found that the Request for Assistance was not linked to the admissibility of pending cases and proceeded to rule on these

admissibility in the operative paragraph of the Decision,²⁰ and the reliance on article 53 rather than articles 18 or 19,²¹ do not alter the Decision's substance, objectively assessed.

14. The Prosecution stresses that it does not assert a general right of appeal of decisions under article 53(3)(a), but only that such decisions are not excluded from the scope of article 82(1)(a) where they are made with respect to jurisdiction or admissibility. Although it was not necessary for the majority to enter into the merits of the admissibility question in the fashion it did,²² as in the *DRC* situation, adopting such an approach triggers a right of appeal under article 82(1)(a).²³

Notice of grounds of appeal

15. The Prosecution will appeal the Decision on three grounds, conforming to the established law that a decision with respect to admissibility may be challenged on the basis of procedural errors, errors of fact, or errors of law.²⁴ These errors materially affected the admissibility analysis, and the Decision's ultimate conclusion.

distinct issues in separate decision"); ICC-01/11-01/11-74 OA, para.11 ("The Pre-Trial Chamber did not even consider, let alone issue a ruling on, the admissibility of the case against Mr Gaddafi [...] It was simply a decision on whether [the applicant] may submit observations under rule 103"); ICC-01/11-01/11-126 OA2, paras.14-15 ("The Impugned Decision concerned a request for the postponement of surrender under article 95 [...] and made no determination concerning the admissibility of the case. [...] The Pre-Trial Chamber dealt exclusively with the question of whether admissibility proceedings had begun. It did not make a finding on whether the case against Mr Gaddafi was admissible"); ICC-01/04-01/07-3424 OA14, para.9, 32, 34 (reasoning that the decision was not a decision relating to jurisdiction in the sense of the Court's material, personal, temporal, or geographic jurisdiction, as opposed to the Court's competence to resolve a particular matter).

²⁰ See Decision, p.26. Cf. *Kenya* Appeal Decision, para.15 ("The Appeals Chamber understands from the phrase 'decision with respect to' that the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case"). The Prosecution emphasises, however, that the remedy in the Decision's operative part was based on the admissibility analysis: *see above* paras.8-9 (citing *inter alia* Decision, paras.49, 51).

²¹ Cf. *Kenya* Appeal Decision, para.16 ("Article 82(1)(a) of the Statute must be read in conjunction with articles 18 and 19 of the Statute [...] In the view of the Appeals Chamber, the specific references to article 82 of the Statute and the use of identical language in articles 19(6) and 82(1)(a) of the Statute indicate that the right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling specifically on the jurisdiction of the Court or the admissibility of the case").

²² See *below* paras.17-19.

²³ See *DRC* Appeal Decision, paras.18, 41. See also *above* fn.4.

²⁴ See e.g. *DRC* Appeal Decision, paras.34-35; ICC-02/04-01/05-408 OA3, paras.46-47.

16. Should the Appeals Chamber grant the appeal, it should reverse the Decision and dismiss the Comoros' application under article 53(3) of the Statute.

Ground One: the Decision applied an incorrect standard of review

17. The Decision erred in law, or procedure, in the standard of review applied. It stated tersely that it would intervene "if it concludes that the validity of the decision is materially affected by an error",²⁵ but did not explain the standard by which the existence of such errors would be determined.²⁶ Although appearing to intend an "appellate" standard of review,²⁷ in practice it applied an even stricter approach which gave *no* deference to the Prosecution, even on factual matters.²⁸ Instead, it found errors where it simply disagreed with the Prosecution.²⁹ This not only far exceeded the Pre-Trial Chamber's mandate under article 53(3) of the Statute, but also the careful balance struck therein between prosecutorial independence and accountability.

18. The erroneous standard of review materially affected the entirety of the analysis in the Decision, and its conclusion. In any event, since the Decision's conclusion is expressly based on "the combination" of the five factors considered by the majority,³⁰ it suffices to show that any one of these factors is materially affected by an error.

19. The Prosecution emphasises its concern for the broader implications of the erroneous standard of review applied by the Pre-Trial Chamber. Article 53(3)(a) reflects a careful balance between appropriate judicial review and focus on the

²⁵ Decision, para.12. *See also* para.9 (asserting its view that it would "test" the "validity of the Prosecutor's decision").

²⁶ On occasion, the Decision characterised Prosecution conclusions as "unreasonable" but did not explain this standard further: *see* Decision, para.38. *See also* para.43 (concluding that the Prosecution erred by relying on a conclusion which was "not the only reasonable inference that could be drawn" from the information).

²⁷ *See also* ICC-01/13-34-Anx-Corr, paras.7-9. *But see e.g.* ICC-01/04-02/12-271-Corr A, para.22.

²⁸ Decision, para.15. *See also* para.14.

²⁹ *See e.g.* Decision, paras.26, 33-34, 37-38, 41, 43. *See further* Prosecution Response to Victims, para.17; ICC-01/13-3-Red, para.52 (quoting ICC-02/04-01/05-408 OA3, para.81). *See also* ICC-01/13-27-Red, para.24.

³⁰ Decision, para.49. *See further* paras.22-24 (first factor), 25-26 (second factor), 27-30 (third factor), 31-45 (fourth factor), 46-48 (fifth factor).

Prosecution's independent analysis of the information available. Although judicial review in this context is well suited to identifying an abuse of discretion, it is not so well adapted to close analysis of the underlying information itself. Nor should the review process generally shift the emphasis to a dialogue between the organs of the Court on the merits of a situation. This approach may be of particular concern in controversial situations.³¹

Ground Two: the Decision misinterpreted the legal standard to be applied by the Prosecutor under article 53 of the Statute

20. The Decision further erred in law in its interpretation of article 53(1). It applied a legal standard for the conduct of preliminary examinations that is not only inconsistent with the plain text of the Statute,³² but misconceives the nature of the analytical process.³³ It confuses the distinction between assessing the reliability of a piece of information and assessing the inference(s) that information may reasonably support. It also overlooks the necessity of evaluating information in context, not in isolation.

21. To the extent that the Decision asserts that the Prosecution must disregard *all* equivocations, contradictions or limitations in the available information in order to give proper scope for investigation, it is also incorrect.³⁴ Article 53(1) of the Statute does not permit the initiation of an investigation if the Prosecutor determines there is no reasonable basis to proceed.³⁵ In this assessment, the Prosecutor is best placed to make the necessary determinations in accordance with the Statute. If new facts or information become available, the Prosecution may reconsider her decision at any

³¹ See *DRC Appeal Decision*, para.72 (noting the caution required due to the "subjective and contingent" nature of reactions in the context of "social alarm"). See also *Decision*, paras.48, 51; ICC-01/13-6-AnxA ("Article 53(1) Report"), para.14; ICC-01/13-14-Red ("Prosecution Response to the Comoros"), paras.98-99.

³² See Statute, arts.15(2), 53(1). See also rule 104(1).

³³ *Decision*, paras.13, 35.

³⁴ See *Decision*, paras.13, 36.

³⁵ See also *Prosecution Response to the Comoros*, para.27.

time under article 53(4).³⁶ In her Article 53(1) Report, the Prosecutor explicitly recognised this possibility in the present situation should, following her decision, *new* reliable facts or information emerge that justify doing so.³⁷

22. Although the impact of the Decision's legal error is most apparent in the context of one particular allegation,³⁸ it raises grave concerns about the majority's approach as a whole.³⁹ In any event, as recalled above, it suffices for the Prosecution to show that any one of the five factors in the Decision is materially affected.⁴⁰

23. The Prosecution further emphasises its concern for the broader implications of this legal error, which has the potential to affect all situations currently undergoing preliminary examination at this Court, as well as broader policy implications for how cases may be selected. To any extent that the standard to be applied by the Prosecution is lower than that suggested by the plain words of the Statute, this may radically affect the scope of the Court's operations, now and for the years to come.

Ground Three: the Decision was insufficiently reasoned

24. The Decision further erred in law by failing to provide sufficient reasoning.⁴¹ The Decision fails to address arguments—and at least one essential fact—relevant to its core findings, as well as sometimes appearing to misapprehend or mischaracterise the basis of the Prosecution's reasoning in its article 53(1) determination and submissions. In particular, the Decision failed to consider or to give adequate reasoning regarding:

³⁶ See e.g. Prosecution Response to Victims, paras.128, 135, 151, 155.

³⁷ Article 53(1) Report, para.151. See also Article 53(1) Report, Executive Summary, para.4.

³⁸ See Decision, paras.35-36.

³⁹ See also Decision, paras.38, 41, 43.

⁴⁰ See above para.18.

⁴¹ See e.g. ICC-01/04-01/06-773 OA5, para.20.

- (i) the interplay between quantitative and qualitative factors in addressing the gravity of any potential case(s) arising from a situation;⁴²
- (ii) the irrelevance of any error, *arguendo*, of legal characterisation in a preliminary examination, provided the relevant facts were properly identified;⁴³ and
- (iii) the unique context of violent resistance aboard the *Mavi Marmara*.⁴⁴

25. The Decision also appears to misapprehend or to mischaracterise the Prosecution's analysis of, or conclusions about, certain factual issues.⁴⁵

26. The Decision's error of reasoning materially affected its conclusions on each of the five factors upon which the Decision was based. In any event, as recalled above, it suffices for the Prosecution to show that any one of the five factors in the Decision is materially affected.⁴⁶

27. The Prosecution further observes that inadequate reasoning is an especially acute concern in the context of an article 53(3)(a) review resulting in a request for reconsideration. By failing to address those issues which the Prosecution has demonstrated it regards as significant to its determination under article 53(1)—or not at least explaining why it does not agree those issues are significant—the Decision substantially impedes the Prosecution's ability meaningfully to comply with the request for reconsideration. Without consensus at least as to which issues are

⁴² See Decision, paras.26, 46-48. *Compare with* Prosecution Response to Comoros, paras.67-73; Article 53(1) Report, paras.144-146.

⁴³ See Decision, paras.28-29. *Compare with* Prosecution Response to Comoros, para.104; Prosecution Response to Victims, paras.69, 74, 111-112.

⁴⁴ See Decision, paras.40-43. *Compare with* Prosecution Response to Comoros, paras.78, 85-87, 89-90; Prosecution Response to Victims, para.113.

⁴⁵ See Decision, paras.23, 35, 37-38. *Compare with* Prosecution Response to Comoros, paras.60-63, 80-83, 88; Prosecution Response to Victims, paras.49, 54, 66, 81, 141-142.

⁴⁶ See *above* para.18.

material, the Prosecution is left to speculate as to the proper contours of any reconsideration, and thus the utility of any such request may be limited.

Suspensive effect

28. Rule 108(2) states that, having received the Decision under article 53(3), “the Prosecutor shall reconsider [her decision not to initiate an investigation] as soon as possible.”

29. Given the broad scope of the errors identified above—and their impact on the entirety of the Decision’s reasoning—the Prosecution does not consider it “possible” to act in accordance with article 53(3) and rule 108 until this appeal is decided. Since this condition in rule 108(2) is thus not met, the Prosecution does not consider it necessary to seek suspensive effect of the Decision under article 82(3) of the Statute.

30. To any extent the Appeals Chamber disagrees, however, the Prosecution alternatively requests suspensive effect in light of the specific circumstances of the situation. In particular, commencing a process of reconsideration in the context of the law and reasoning in the Decision would defeat the purpose of this appeal,⁴⁷ which contends that, but for the errors in the Decision, no request for reconsideration would have been made.

Conclusion

31. For the reasons above, the Prosecution requests the Appeals Chamber to accept this appeal pursuant to article 82(1)(a) of the Statute, to reverse the Decision, and to dismiss the Comoros’ application under article 53(3)(a) of the Statute.

⁴⁷ See e.g. ICC-01/05-01/08-817 OA3, para.11.

32. The Prosecution will file its brief supporting this appeal by 10 August 2015.

Word count: 3,944⁴⁸



Fatou Bensouda, Prosecutor

Dated this 27th day of July 2015

At The Hague, The Netherlands

⁴⁸ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para.32.