

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/13
Date: 5 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 THE REGISTERED VESSELS OF THE UNION OF THE
COMOROS, THE HELLENIC REPUBLIC AND THE KINGDOM OF CAMBODIA**

Public Document

**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)"**

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. On 14 May 2013, the authorities of the Union of the Comoros (the “Comoros”) referred to the Prosecutor the situation relating to the incidents allegedly committed from 31 May 2010 through 5 June 2010 on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia bound for the Gaza Strip (the “Referral” and the “Situation”, respectively).¹

2. On 6 November 2014, the Prosecutor issued a report in which she concluded that there is “[a] reasonable basis to believe that war crimes under the Court’s jurisdiction have been committed in the context of interception and takeover of the Mavi Marmara by IDF soldiers on 31 May 2010”, but considering that “[t]he potential case(s) that would likely arise from an investigation into the situation would not be of sufficient gravity to justify further action by the Court and would therefore be inadmissible pursuant to articles 17(1)(d) and 53(1)(b) of the Statute”, she decided that “[t]here is no reasonable basis to proceed with an investigation and [...] decided to close this preliminary examination” (the “Prosecutor’s Decision”).²

3. On 29 January 2015, the Comoros requested Pre-Trial Chamber I (the “Chamber”) to review the Prosecutor’s Decision and to direct the Prosecutor to reconsider said Decision under Article 53(3)(a) of the Rome Statute (the “Application for Review”).³

¹ See the “Annex 1: Decision Assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I” (Presidency), No. ICC-01/13-1-Anx1, 5 July 2013 (the “Referral”).

² See “Situation on Registered Vessels of Comoros, Greece, and Cambodia: Article 53(1) Report”, No. ICC-01/13-6-AnxA, 4 February 2015 (dated 6 November 2014), paras. 149-151 (the “Prosecutor’s Decision” or the “Decision”).

³ See the “Application for Review pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation in the Situation”, No. ICC-01/13-3-Conf, 29 January 2015 (the “Application for Review”).

4. On 30 March 2015, the Prosecutor provided its response to the Application for Review.⁴

5. On 24 April 2015, the Chamber issued the “Decision on Victims’ Participation”, whereby it, *inter alia*, appointed the Principal Counsel of the Office of Public Counsel for Victims (the “Legal Representative”) for unrepresented victims for the purposes of the current proceedings under Article 53 of the Rome Statute, and invited victims who had communicated with the Court to submit any observations deemed relevant to the Chamber’s review of the Prosecutor’s Decision by 5 June 2015.⁵

6. On 18 May 2015, the Chamber extended until 22 June 2015 the deadline for the Legal Representative to submit the observations of the victims she represents in the current proceedings.⁶

7. On 22 June 2015, pursuant to the Decision on Victims’ Participation,⁷ the Legal Representative submitted observations on behalf of 109 victims.⁸

8. On 16 July 2015, the Chamber, by Majority, requested the Prosecutor to reconsider her decision not to initiate an investigation into the Situation (the “Decision”).⁹

⁴ See the “Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute”, No. ICC-01/13-14-Conf, 30 March 2015.

⁵ See the “Decision on Victims’ Participation” (Pre-Trial Chamber I), No. ICC-01/13-18, 24 April 2015, p. 10.

⁶ See the “Decision on the ‘Request for extension of time to submit Victims’ Observations in relation to the article 53 proceedings” (Pre-Trial Chamber I), No. ICC-01/13-23, 19 May 2015.

⁷ See the “Decision on Victims’ Participation”, *supra* note 5, para. 21.

⁸ See the “Notification following the appointment of the Office of Public Counsel for Victims as legal representative of unrepresented victims who have communicated with the Court for the purposes of the proceedings under article 53(3)a of the Rome Statute”, No. ICC-01/13-26, 28 May 2015; and the “Observations on behalf of victims in the proceedings for the review of the Prosecutor’s decision not to initiate an investigation”, No. ICC-01/13-27-Red, 23 June 2015.

⁹ See the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation” (Pre-Trial Chamber I), No. ICC-01/13-34, 16 July 2015 (the “Decision”).

9. On 27 July 2015, the Prosecution filed before the Appeals Chamber a notice of appeal against the Decision under Article 82(1)(a) of the Rome Statute (the “Notice of Appeal”).¹⁰

10. On 3 August 2015, the Comoros filed an application for the Appeals Chamber to dismiss *in limine* the Notice of Appeal, before receiving submission on the grounds of appeal and considering the merits of the appeal (the “Dismissal *in limine* Request”).¹¹

11. On 4 August 2015, the Prosecution filed a response to the Dismissal *in limine* Request, *inter alia* requesting the Appeals Chamber to rule on it as matter of urgency (the “Prosecution’s Request”).¹²

II. LEGAL REPRESENTATIVE’S REQUEST

12. The Legal Representative submits that the Notice of Appeal was improperly filed and is inadmissible. The Prosecution seeks to appeal the Decision pursuant to Article 82(1)(a) of the Rome Statute on the basis that it is a “*decision with respect to admissibility*”,¹³ although the Decision does not qualify the Situation as “admissible” or “inadmissible”. In these circumstances, Article 82(1)(a) of the Rome Statute does not provide a valid basis for challenging the Decision and the Prosecution’s appeal must therefore be dismissed *in limine*.

¹⁰ See the “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)”, No. ICC-01/13-35, 27 July 2015 (the “Notice of Appeal”).

¹¹ See the “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)”, No. ICC-01/13-39, 3 August 2015 (the “Dismissal *in limine* Request”).

¹² See the “Prosecution’s Urgent Response to the Government of the Union of the Comoros’ Application to Dismiss the Appeal In Limine, and Request for Extension of Pages under Regulation 37 of the Regulations of the Court”, No. ICC-01/13-40, 4 August 2015 (the “Prosecution’s Request”).

¹³ See the Notice of Appeal, *supra* note 10, para. 2.

13. In the interest of judicial economy, and in order to avoid unnecessary litigation as well as procedural uncertainties, the Legal Representative respectfully seeks an order from the Appeals Chamber providing directions on the submission of observations by parties and participants, including by victims, in the instant proceedings.

14. This is the first time that an appeal is brought against a decision taken pursuant to Article 53 of the Rome Statute. Considering the novelty of the matter, guidance from the Appeals Chamber is necessary for the following reasons: (1) it will clarify the scope and the manner in which victims can participate in the instant proceedings (2) it will provide clarity as to how the parties and participants must address the issue of admissibility of the Prosecution's appeal; and (3) it will establish appropriate time limits for the submission of the Prosecution's Document in Support of the Appeal and the responses thereto.

1. Victims' participation

15. The proceedings related to the opening of an investigation pursuant to Article 53 of the Rome Statute are crucial to the personal interests of the victims. In this regard, the Pre-Trial Chamber found that *"victims' participation in the context of the article 53(3) review proceedings is a mandatory requirement stemming from rule 92(2) of the Rules, which applies irrespective of the grounds on which the Prosecutor bases the decision under article 53(1) of the Statute"*.¹⁴

16. Accordingly, victims have actively participated in the Article 53(3) proceedings before the Pre-Trial Chamber. Victims have been able to provide their views and concerns on most factual and legal issues arising from the Prosecutor's Decision, including the issues mentioned in the subsequent Notice of Appeal. Nonetheless, given that the present appeal is the first of its kind, the manner in which

¹⁴ See the Decision on the Victims' Participation, *supra* note 5, para. 8

victims may participate in the proceedings before the Appeals Chamber is not entirely clear, and may be subject to specific procedural requirements. For avoidance of any doubt, and in light of the importance of the matters raised to the interests of the victims, the Legal Representative respectfully requests the Appeals Chamber to issue directions on the modalities of participation of victims in the instant proceedings.

2. Admissibility of the Prosecution's appeal

17. As outlined above, victims intend to challenge the possibility for the Prosecution to appeal a decision under Article 53 of the Rome Statute and request that the Appeals Chamber dismiss the Notice of Appeal *in limine*. In this regard, the Legal Representative notes that the Comoros has already requested that the Prosecution's appeal be dismissed *in limine* "*on the grounds that the Prosecution has no basis at all under the plain terms of the Statute and the Rules, and given the explicit case law on point, to seek to appeal the impugned decision under Article 82(1)(a), as of right directly to the Appeals Chamber, as the decision is not a decision "with respect to ... admissibility"*".¹⁵

18. The Legal Representative therefore seeks the Appeals Chamber's directions on whether the dismissal of the Prosecution's appeal can be requested prior to the submission of the Document in Support of the Appeal.

3. Time limit for the submission of the Document in Support of the Appeal and the responses thereto

19. The Legal Representative requests the Appeals Chamber to adopt a specific procedural framework whereby preliminary issues such as the questions related to the admissibility of the Prosecution's appeal and the request for suspensive effect are

¹⁵ See the Dismissal *in limine* Request, *supra* note 11, para. 1.

addressed before any submission is made on the merits of said appeal. The Comoros has already made similar suggestions¹⁶ and the Prosecution has not opposed such course of action.¹⁷

20. Assuming that the Prosecution's appeal is found to be admissible, the Legal Representative further requests the Appeals Chamber to set a time limit for the filing of the Prosecution's Document in Support of the Appeal and the responses thereto.


21. If, instead of ruling separately on the admissibility of the Prosecution's appeal the Appeals Chamber decides to rule on it together with the merits thereof, the Legal Representative requests the Appeals Chamber to set an appropriate time limit for the Legal Representative to file a consolidated response.

¹⁶ See the Dismissal *in limine* Request, *supra* note 11, para. 8.

¹⁷ See the Prosecution's Request, *supra* note 12, para. 3.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests the Appeals Chamber to issue directions on the conduct of the proceedings following the Notice of Appeal.

It is hereby certified that this document contains a total of 1,986 words and complies in all respects with the requirements of Regulation 36 of the Regulations of the Court.¹⁸

A handwritten signature in black ink, reading 'Paolina Massidda', with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 5th day of August of 2015

At The Hague, The Netherlands

¹⁸ This statement (30 words), not itself included in the word count, follows the Appeals Chamber's direction. See the "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'" (Appeals Chamber), No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 32.