

**Cour
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**International
Criminal
Court**

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Date: **21 November 2018**

PRE-TRIAL CHAMBER I

Before: Judge Péter 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

**Request for Leave to Appeal the “Decision on the ‘Application for Judicial Review
by the Government of the Union of the Comoros’”**

Source: Office of the Prosecutor

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Introduction

1. In its decision of 15 November 2018,¹ the majority of Pre-Trial Chamber I rejected the Prosecution's request to dismiss *in limine*²—for want of jurisdiction—the application by the Government of the Union of the Comoros for review³ of the Prosecutor's final decision, insofar as it was issued under rule 108(3).⁴ Based on its conclusion that it continues to possess jurisdiction under article 53(3)(a) of the Rome Statute, the majority granted the Comoros' request in part, set aside the Prosecutor's Final Decision, and requested the Prosecutor to further reconsider her original article 53(1) report⁵ by 15 May 2019.

2. The Prosecution respectfully seeks leave to appeal certain issues arising from the Decision, which significantly affect the fair and expeditious conduct of the proceedings, and in respect of which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Submissions

3. The Prosecution wishes to begin this submission by underlining its concern, and regret, that its attempt to comply with the Pre-Trial Chamber's original request for reconsideration, resulting in the 144-page Prosecutor's Final Decision, has given rise to the perception that it sought to disregard the request,⁶ to wilfully refrain from addressing the factors to which the former majority of the Pre-Trial Chamber referred,⁷ or in any other way not to act appropriately or with transparent good faith.⁸ Whatever the reasons for this impression, it is a matter of personal concern to the Prosecutor that it has arisen. In all aspects of these proceedings, her intention, and that of her Office, has only ever been to address the concerns of the Pre-Trial

¹ [ICC-01/13-68](#) (“Decision”).

² [ICC-01/13-61](#) (“Prosecution Response (Lack of Jurisdiction)”).

³ [ICC-01/13-58-Red](#) (“Application”).

⁴ [ICC-01/13-57-Anx1](#) (“Prosecutor's Final Decision” or “Final Decision”). *See also* [ICC-01/13-34](#) (“Article 53(3)(a) Request”).

⁵ [ICC-01/13-6-AnxA](#) (“Article 53(1) Report”).

⁶ *See* [Decision](#), paras. 111, 113, 115.

⁷ *See* [Decision](#), paras. 83, 119.

⁸ *See* [Decision](#), para. 82.

Chamber, the Comoros, and the participating victims with respect, while explaining as clearly and transparently as possible the basis for her actions and conclusions within the framework of the Statute and the Rules.

4. There clearly exists a respectful difference of legal opinion on a number of issues pertinent to the Decision, the Prosecutor’s Final Decision, and the Article 53(3)(a) Request. This is demonstrated not only by the contrasting opinions of the Pre-Trial Chamber in the Decision,⁹ but also the differences in interpreting the Appeals Chamber’s prior ruling in this situation,¹⁰ and the contrasting opinions of the Pre-Trial Chamber in the Article 53(3)(a) Request.¹¹ The Prosecution does not seek to challenge the fundamental notions enshrined in the Statute, but it does consider that the practical implications of those notions would seem to be in dispute.¹²

5. Indeed, these differences now find expression in the issues arising from the Decision, particularly on matters related to the jurisdiction of the Court once the Prosecutor has formally notified the Pre-Trial Chamber of her final decision under rule 108(3).¹³ These issues warrant the assistance and guidance of the Appeals Chamber, both in the interest of this situation but also more generally.

6. The Prosecution has carefully considered whether it would be appropriate to raise such matters directly with the Appeals Chamber under article 82(1)(a) of the Statute. While it is of the view that such an approach could be sustainable as a matter of law,¹⁴ it is attentive in the present case to the views expressed by various members

⁹ Compare [Decision](#) with [ICC-01/13-68-Anx](#) (“Dissenting Opinion”).

¹⁰ See e.g. [Decision](#), paras. 84, 94, 99, 108; [Dissenting Opinion](#), paras. 3, (fn. 6), 16, 22. See further [ICC-01/13-51 OA](#) (“Appeals Chamber Admissibility Decision”).

¹¹ Compare [Article 53\(3\)\(a\) Request](#) with [ICC-01/13-34-Anx-Corr](#).

¹² Cf. [Decision](#), para. 86.

¹³ See further below paras. 8-14.

¹⁴ Specifically, in the Prosecution’s view, the Decision is jurisdictional in “nature” because it determines the existence, nature, and/or scope of the Court’s jurisdiction once the Prosecutor has formally issued her final decision under article 53(3)(a) and rule 108(3), which would otherwise terminate all proceedings before the Court concerning the preliminary examination, subject only to a further decision by the Prosecutor under article 53(4). In other words, the Decision is premised on interpreting the legal powers of the Court to state the law on a given issue, under certain conditions. Not only does the operative part of the Decision—the Disposition—pertain

of the Pre-Trial Chamber that proceeding under article 82(1)(d) would be appropriate.¹⁵ It also considers that, in the particular circumstances of this situation, seeking the Pre-Trial Chamber’s certification of issues for appeal may be another means of demonstrating the Prosecution’s sincere respect for the Pre-Trial Chamber and desire to resolve constructively the legal ambiguities that have arisen.

7. For these reasons, the Prosecution respectfully seeks leave to appeal the Decision on the issues identified in the following paragraphs.

Three issues arise from the Decision, and should be certified for appeal

8. The Prosecution identifies three issues arising from the Decision, for which it seeks certification to appeal. “[A]n appealable issue must be ‘an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion’.”¹⁶ The proposed issues—which are, to some extent, inter-related—each satisfy this requirement.

9. The first proposed issue is:

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).

10. This issue—raising a fundamental question of jurisdiction, in the sense of the existence, nature, and scope of the Court’s activities as a whole—is plainly an

directly to a question on the jurisdiction of the Court”—because it establishes and depends upon the view that jurisdiction continues even after a formal rule 108(3) notification—but both the majority and the dissenting judge expressly recognised the jurisdictional nature of the ruling: [Decision](#), paras. 19, 63-70, 87,114; [Dissenting Opinion](#), paras. 9-10, 21, 38. See further e.g. [ICC-01/04-02/06-1225 OA2](#), para. 15 (quoting [ICC-01/09-78 OA](#), paras. 15-17). See also [Appeals Chamber Admissibility Decision](#).

¹⁵ See e.g. [Decision](#), para. 84 (referring to “leave to appeal under article 82(1)(d)” as “the correct basis to proceed”); [Dissenting Opinion](#), para. 3 (“In case of disagreement, as in the present case, the Statute prescribes the appropriate procedural route to be followed, namely through appeals proceedings, which encompass article 82(1)(d)”).

¹⁶ See e.g. [ICC-01/04-168 OA3](#), para. 9.

identifiable subject or topic requiring a decision for its resolution, and indeed a matter of first impression at the Court. It clearly arises from the Decision because it formed the very heart of the Prosecution's response (in seeking to dismiss the Comoros' application *in limine* for want of jurisdiction),¹⁷ and the Pre-Trial Chamber's view of this issue constitutes the predicate finding for all further relief that it ordered.¹⁸ This is also an issue on which the majority and the dissenting judge expressly reached different legal conclusions.¹⁹

11. The second proposed issue is:

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).

12. This issue is likewise an identifiable subject or topic requiring a decision for its resolution because it addresses the circumstances in which a preliminary examination is validly 'closed' following an article 53(3)(a) request. Again, this legal question is a matter of first impression at the Court. It arises from the Decision because it seems to have constituted a vital step in the Pre-Trial Chamber's conclusion that it could exercise jurisdiction over the Comoros' application, irrespective of other jurisdictional questions which may arise within the context of the first proposed issue.²⁰ It also constitutes an integral part of the relief ordered by the Pre-Trial Chamber.²¹ The Pre-Trial Chamber took this step without hearing from

¹⁷ See e.g. [Decision](#), paras. 19, 39, 63-70, and Disposition.

¹⁸ [Decision](#), paras. 95, 114, and Disposition.

¹⁹ Compare e.g. [Decision](#), paras. 95, 114, with [Dissenting Opinion](#), paras. 8-10, 19-21.

²⁰ See e.g. [Decision](#), paras. 87, 109, 111-113, 115-116.

²¹ See e.g. [Decision](#), paras. 115, 117, and Disposition.

the Prosecution,²² either on the legality of this measure or whether it was appropriate in the circumstances in light of the Pre-Trial Chamber's concerns.²³

13. The third proposed issue is:

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.

14. This issue is, again, an identifiable subject or topic requiring a decision for its resolution because it goes to the heart of the distinction between the procedures established by article 53(3)(a) and 53(3)(b) of the Statute.²⁴ It also goes to the heart of the Appeals Chamber's prior decision in this situation, which appears to be interpreted somewhat differently at least by the majority of the Pre-Trial Chamber

²² [Decision](#), para. 39.

²³ The Prosecution notes, in this regard, that the majority appears to set aside the Prosecutor's Final Decision on the basis of its view that the Prosecutor had herself "set aside the Chamber's decision in order to *exclusively* address the Parties' and participants' submissions" ([Decision](#), para. 113, emphasis in original), and to have wholly disregarded the content of the Pre-Trial Chamber's prior decision (*e.g.* [Decision](#), paras. 83, 87, 96, 106, 109, 111), particularly the "five main errors identified" ([Decision](#), para. 117). While the Prosecution regrets any confusion that may have ensued from the structure of the Prosecutor's Final Decision—or from its attempt to explain in detail the legal basis for its reasoning—the issues identified by the Pre-Trial Chamber were not in fact disregarded: *see* [Prosecutor's Final Decision](#), paras. 94 (first bullet) (persons likely to be the object of investigation); 73-74, 76-80 (scale of identified crimes); 81-87 (nature of identified crimes); 88-93, 94 (second and third bullets) (manner of commission of identified crimes); 73, 75-80 (impact of identified crimes). Many of these same issues were then further addressed, in the context of the more expansive arguments made by the Comoros (but not reproduced *verbatim* in the Pre-Trial Chamber's original decision) subsequently in the Prosecutor's Final Decision: *e.g.* paras. 166-170 (persons likely to be the object of investigation); 127-131 (scale of identified crimes); 160-165 (nature of identified crimes); 99-126, 135-159 (manner of commission of identified crimes); 127-134 (impact of identified crimes). These same issues were then addressed again in the context of the Prosecutor's separate exercise of discretion under article 53(4), in evaluating information newly made available, which was contained in the third part of the Prosecutor's Final Decision: *e.g.* paras. 328-331 (persons likely to be the object of an investigation); 201-203, 232-239 (scale of identified crimes); 188-200, 232-239, 276-282, 287-303 (nature of identified crimes); 204-231, 242-275, 279-286, 304-327 (manner of commission of identified crimes). In this latter respect, however, the Prosecution stresses that these citations are provided to illustrate some of the ways in which newly available information could be seen as relevant; they do not reflect any conclusions by the Prosecution as such since none of the information newly available warranted reconsideration under article 53(4).

²⁴ Specifically, the Prosecutor may be "request[ed] [...] to reconsider" her prior decision under article 53(3)(a), while under article 53(3)(b) her decision "shall be effective only if confirmed by the Pre-Trial Chamber": *see* [Statute](#), art. 53(3).

and the Prosecution.²⁵ This issue arises from the Decision because it both underpins the Pre-Trial Chamber's conclusion that the Prosecutor in her Final Decision had not complied with the Article 53(3)(a) Request,²⁶ and because it reflects the content of the further order that the Pre-Trial Chamber appears to have given to the Prosecutor.²⁷

The proposed issues each significantly affect the fair and expeditious conduct of the proceedings

15. Each of the proposed issues significantly affects the fair and expeditious conduct of the proceedings.

16. The proposed issues significantly affect the fair conduct of the proceedings because they determine the scope of the procedural guarantees which the Court provides to States, and indirectly to participating victims.²⁸ The fairness of the pre-investigative proceedings at this Court is determined, at least in part, by the balance between opportunities for review and reasonable finality, which in turn is closely related to the proper allocation of resources—a key aspect in ensuring the accessibility of the Court to investigate and prosecute within its mandate.²⁹ All three of the proposed issues directly speak to the way in which this balance is struck.

17. Likewise, the proposed issues significantly affect the expeditious conduct of the proceedings because they determine the existence, nature, and scope of any judicial proceedings once the Prosecutor has notified the Pre-Trial Chamber of her final decision under rule 108(3). As such, they necessarily go to the balance between duration and effectiveness of proceedings which is central to the concept of 'expedition'. In particular, the proposed issues not only impact the procedural regime which applies (specifically, for example, whether the Prosecutor may be requested to reconsider on multiple occasions) but also the nature of the analysis

²⁵ See [Appeals Chamber Admissibility Decision](#).

²⁶ See e.g. [Decision](#), para. 109; [Dissenting Opinion](#), paras. 16-18, 20, 22.

²⁷ See e.g. [Decision](#), para. 117, and Disposition.

²⁸ See also [Decision](#), paras. 100, 120. See further [Prosecution Response \(Lack of Jurisdiction\)](#), para. 16.

²⁹ See [Prosecution Response \(Lack of Jurisdiction\)](#), para. 14.

which the Prosecutor is obliged to undertake (whether the Prosecutor's reconsideration is to be conducted on the basis of her own appreciation of the law and facts, or those of the Pre-Trial Chamber). These factors potentially determine both the duration of the proceedings and their effectiveness in achieving the objectives for which they were established.

The proposed issues significantly affect the outcome of the preliminary examination

18. Alternatively, while it is inapposite at this stage of proceedings to consider the "outcome of the trial" (in the literal wording of article 82(1)(d)), the Pre-Trial Chamber may consider the impact of the proposed issues, *mutatis mutandis*, on the outcome of the preliminary examination of this situation.

19. It is obvious in this case that the proposed issues significantly affect the outcome of the preliminary examination because resolution of each of them could directly lead either to the conclusion that the preliminary examination has already been terminated, following the Prosecutor's notification under rule 108(3), or that the preliminary examination continues with the consequent possibility that it might lead to an investigation. This alone should justify certification of the proposed issues, in the circumstances of this situation.

Immediate resolution of the proposed issues by the Appeals Chamber may materially advance the proceedings

20. As the Pre-Trial Chamber has noted, the proceedings in this situation now have a lengthy history.³⁰ Immediate resolution of the proposed issues by the Appeals Chamber may thus materially advance the proceedings by clarifying the applicable rights and obligations, and ensuring as much as possible that the stage is set to ensure that this situation can, henceforth, be resolved properly according to the law.

³⁰ See e.g. [Decision](#), paras. 1-23, 119.

Unlike other interlocutory appeals, which are normally premised on the assumption that a final appeal ‘on the merits’ will be available to the Parties, no such outcome exists for litigation concerning preliminary examination. If the important legal issues arising from the Decision are not certified now, there is no prospect that they will ever receive timely appellate attention and clarification.

21. Moreover, to any extent the Prosecution may have misunderstood the nature of its obligations and any aspects of the Pre-Trial Chamber’s decisions, appellate intervention will assist in resolving these matters promptly and definitively.

Request for provisional stay of the Decision

22. The Decision sets a deadline for the Prosecutor to reconsider her Article 53(1) Report, and requests her to do so by 15 May 2019.³¹ Accordingly, the Prosecution requests that the Pre-Trial Chamber provisionally stays the effects of the Decision pending its deliberations, so that the deadline does not begin to run.

23. While such matters are entirely for the discretion of the Pre-Trial Chamber, the Prosecution respectfully recalls the practice of the Appeals Chamber in this situation in ordering suspensive effect of the Article 53(3)(a) Request, recognising that requiring the Prosecution to commence any reconsideration while further proceedings were ongoing would risk defeating the object of any appeal process.³² The Prosecution submits that similar considerations may equally apply in this case.³³

24. The Prosecution emphasises that the Pre-Trial Chamber is not itself requested to authorise suspensive effect—a power confined to the Appeals Chamber³⁴—but only

³¹ [Decision](#), para. 121, and Disposition.

³² *But see* [Appeals Chamber Admissibility Decision](#).

³³ *See* [ICC-01/13-43 OA](#), paras. 7-8 (recalling that such decisions are discretionary, but that “it would defeat the purpose” of the Prosecution’s previous appeal in this situation “if the Prosecutor were to reconsider her Decision not to Investigate before the issues arising therein are determined”).

³⁴ *See e.g.* [ICC-01/04-01/10-469](#), p. 5.

to take the necessary measures to prevent the Appeals Chamber's power being frustrated in the event of an appeal.³⁵

Conclusion

25. For the reasons above, the Pre-Trial Chamber is respectfully requested to certify the proposed issues for appeal and, if it deems necessary, to stay the effect of the Decision pending its ruling on this request.



Fatou Bensouda, Prosecutor

Dated this 21st day of November 2018

At The Hague, The Netherlands

³⁵ See e.g. [ICC-01/04-01/06-2536](#), paras. 2, 11.