

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/13 OA 2  
Date: 24 January 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 Ibañez Carranza

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

**Public Document**

**Victims' response to the Prosecution's Omnibus Request**

**Source:** Office of Public Counsel for Victims

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

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## I. INTRODUCTION

1. In accordance with the “Order on the filing of responses to the request of the Prosecutor for extension of pages, extension of time and suspensive effect”,<sup>1</sup> the Principal Counsel of the Office of Public Counsel for Victims (the “OPCV”), in her capacity of legal representative of unrepresented victims, hereby submits her response to the “Prosecution’s omnibus request for extension of pages, extension of time, and suspensive effect”<sup>2</sup> (the “Omnibus Request”), filed on 21 January 2019.

2. The Principal Counsel does not oppose the request that the appeals schedule be expedited, nor does she oppose the request for an extension of time and an extension of page limit under the condition that corresponding extensions be granted to the victims and other participants.

3. The Principal Counsel, however, strongly opposes the request for suspensive effect. The Prosecution not only fails to demonstrate that the legal criteria justifying such a request are fulfilled in the circumstances, but granting the request would not be in the interests of victims in particular, or in the interests of justice in general.

## II. PROCEDURAL BACKGROUND<sup>3</sup>

4. On 14 May 2013, the authorities of the Union of the Comoros referred to the Prosecutor the situation relating to the incidents allegedly committed from

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<sup>1</sup> See the “Order on the filling of responses to the request of the Prosecutor for extension of pages, extension of time and suspensive effect” (Appeals Chamber), [No. ICC-01/13-76 OA2](#), 22 January 2019.

<sup>2</sup> See the “Prosecution’s omnibus request for extension of pages, extension of time, and suspensive effect”, [No. ICC-01/13-74 OA2](#), 21 January 2019 (the “Omnibus Request”).

<sup>3</sup> Given the arguments developed in the Omnibus Request, the Principal Counsel is compelled to provide a full historical background of the present proceedings.

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.<sup>4</sup>

5. On 6 November 2014, the Prosecutor reached a decision not to open an investigation in the situation.<sup>5</sup> On 29 January 2015, the Union of the Comoros requested Pre-Trial Chamber I to review the Decision Not to Investigate and direct the Prosecutor to reconsider said decision.<sup>6</sup>

6. On 16 July 2015, Pre-Trial Chamber I, by Majority, requested the Prosecutor to reconsider her decision not to initiate an investigation 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.<sup>7</sup>

7. On 27 July 2015, the Prosecution filed the Notice of Appeal of the Review Decision.<sup>8</sup> On 6 November 2015, the majority of the Appeals Chamber found the appeal inadmissible.<sup>9</sup>

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<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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-Red](#), 29 January 2015.

<sup>7</sup> See “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.

<sup>8</sup> See the “Notice of Appeal of the ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’”, [No. ICC-01/13-35 OA](#), 27 July 2015.

<sup>9</sup> See the “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’” (Appeals Chamber), [No. ICC-01/13-51 OA](#), 6 November 2015. See also the “Joint dissenting opinion of Judge Silvia Fernández De Gurmendi and Judge Christine Van Den Wyngaert”, [No. ICC-01/13-51-Anx OA](#), 6 November 2015.

8. On 29 November 2017, the Prosecutor notified Pre-Trial Chamber I of her further decision not to initiate an investigation in the situation (the “29 November 2017 Decision”).<sup>10</sup>

9. On 23 February 2018, the referring State filed a further “Application for Judicial Review by the Government of the Union of the Comoros”,<sup>11</sup> asking Pre-Trial Chamber I to review the 29 November 2017 Decision. On 2 March 2018, the Chamber extended until 3 April 2018 the time limit for responding to said application.<sup>12</sup> On 13 March 2018, the Prosecution filed its response,<sup>13</sup> requesting the dismissal of the Application for Judicial Review *in limine* for lack of jurisdiction and the stay of the deadline to respond pending a ruling on the matter. On 15 March 2018, the Union of the Comoros requested Pre-Trial Chamber I to maintain said deadline for the submissions on the jurisdiction and the merits or to permit the referring State to respond by said date to the Prosecution’s response.<sup>14</sup> Victims responded on 29 March 2018 requesting the Chamber to grant the Union of the Comoros’ application and to find that the legal requirements of gravity are met.<sup>15</sup>

10. On 15 November 2018, Pre-Trial Chamber I rendered its “Decision on the “Application for Judicial Review by the Government of the Union of the Comoros” (the “15 November 2018 Decision”) finding, *inter alia*, that “the 29 November 2017

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<sup>10</sup> See the “Annex 1 to the Notice of Prosecutor’s Final Decision under Rule 108(3)”, [No. ICC-01/13-57-Anx1](#), 30 November 2017.

<sup>11</sup> See the “Application for Judicial Review by the Government of the Union of the Comoros”, with Confidential Annexes 1-3, No. ICC-01/13-58-Conf, 26 February 2018. A public redacted version was made available on the same day, see [ICC-01/13-58-Red](#).

<sup>12</sup> See the “Decision on the Request for an Extension of Time” (Pre-Trial Chamber I), [No. ICC-01/13-60](#), 2 March 2018.

<sup>13</sup> See the “Prosecution’s Response to the Government of the Union of the Comoros’ “Application for Judicial Review” (ICC-01/13-58) (Lack of Jurisdiction)”, [No. ICC-01/13-61](#), 13 March 2018.

<sup>14</sup> See the “Application by the Government of the Comoros regarding the Pre-Trial Chamber’s Scheduling Order”, [No. ICC-01/13-62](#), 15 March 2018.

<sup>15</sup> See the “Victims’ Response to the Application for Judicial Review by the Government of the Union of the Comoros”, [No. ICC-01/13-65](#), 29 March 2018.

*decision cannot be considered to be final within the meaning of rule 108(3) of the Rules*<sup>16</sup>, and requested the Prosecutor to reconsider her decision of 6 November 2014 in accordance with its 2015 Decision on the matter, and to notify the Chamber and those participating in the proceedings of her final decision no later than Wednesday 15 May 2019.<sup>17</sup>

11. On 21 November 2018, the Prosecution requested leave to appeal the 15 November 2018 Decision.<sup>18</sup>

12. On 18 January 2019, Pre-Trial Chamber granted the Prosecution's request for leave to appeal in part, certifying two of the Prosecution's purported grounds of appeal.<sup>19</sup>

13. On 21 January 2019, the Prosecution filed its Omnibus Request, whereby it seeks (i) that the appeals schedule be expedited; (ii) the augmentation of pages available for its brief to a maximum of 50 pages; (iii) an extension of time limit until Monday 11 February 2019 to submit its brief; and (iv) suspensive effect in relation to the 15 November 2018 Decision until the determination of its appeal.<sup>20</sup>

### III. SUBMISSIONS

14. The Principal Counsel does not oppose the Prosecution's requests to expedite the appeal proceedings, nor does she oppose the requests for extensions of time and

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<sup>16</sup> See the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'" (Pre-Trial Chamber I), [No. ICC-01/13-68](#), 15 November 2018 (the "15 November 2018 Decision"), p. 45.

<sup>17</sup> *Idem*, paras. 120-121.

<sup>18</sup> See the "Request for Leave to Appeal the 'Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'", [No. ICC-01/13-69](#), 21 January 2019.

<sup>19</sup> See the "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'" (Pre-Trial Chamber I), [No. ICC-01/13-73](#), 18 January 2019.

<sup>20</sup> See the "Request for Leave to Appeal the 'Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'", *supra* note 20, para. 16.

page limits under the condition that she be granted corresponding extensions so as to enable her to properly impart the views and concerns of the victims she represents in these proceedings. An extension of time would not affect the expeditiousness of the proceedings, as the appeals proceedings are to be resolved in parallel to the implementation of the deadline imposed by virtue of the 15 November Decision.<sup>21</sup>

15. As for the Prosecution's request for suspensive effect of the 15 November 2018 Decision, the Principal Counsel strongly opposes said request. The Prosecution does not advance any reasons justifying the suspension. Indeed, it fails to advance any valid reasons as to why suspensive effect is necessary to safeguard the integrity of the present proceedings and merely puts forward speculative arguments as to the purported outcome of the appeal, which cannot meet the required legal threshold. As recalled by the Appeals Chamber, "*suspension involves the non-enforcement of a decision, the subject of the appeal*".<sup>22</sup>

16. First and foremost, the deadline is only ancillary to the *subject* of the appeal, namely the interpretation of article 53(3)(a) of the Rome Statute. Second, Pre-Trial Chamber I did not require the Prosecutor to conduct a third review as argued in the Omnibus Request,<sup>23</sup> but to carry out the review she was already ordered to carry out by virtue of the 16 July 2015 Decision – a decision the Prosecution did not appeal on the merits.

17. For the Appeals Chamber to properly exercise its discretion to grant a request for suspensive effect, it must further be satisfied that "*the implementation of the decision*

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<sup>21</sup> See *infra*, para. 16.

<sup>22</sup> See the "Decision on suspensive effect" (Appeals Chamber), [No. ICC-01/04-02/06-1968 OA 6](#), 19 June 2017, para. 9. See also the "Decision on the Prosecutor's Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review" (Appeals Chamber), [No. ICC-02/04-01/05-92 OA](#), 13 July 2006, para. 3; and the "Dissenting Opinion of Judge Morrison and Judge Hofmański in respect of the decision on suspensive effect", [No. ICC-02/11-01/15-1243 OA 14](#), 18 January 2019, para. 3.

<sup>23</sup> See the Omnibus Request, *supra* note 2, para. 13.

*under appeal (i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant', (ii) would lead to consequences that 'would be very difficult to correct and may be irreversible', or (iii) 'could potentially defeat the purpose of the appeal'".<sup>24</sup>*

18. The Prosecution contends that in the absence of suspensive effect, it would be obliged to continue "*invest[ing] considerable time and scarce resources*"<sup>25</sup> in vain if the Appeals Chamber were to set aside the 15 November 2018 Decision. This argument is misconceived as the consideration of an 'irreversible situation' is not concerned with financial expenditure but rather with substantive and fundamental rights of the parties and participants involved and the judicial process as such.

19. It is moreover clear from the submissions of the Prosecution that the concerns about expending 'scarce resources' are not the core reason underlying its request. Rather, the Prosecution indicates that the six-month deadline set by Pre-Trial Chamber I "*is already now a four month deadline*".<sup>26</sup> This statement in itself illustrates that the Prosecution has not, to date, undertaken *any* steps towards complying with the 15 November 2018 Decision, but is simply waiting for it to be overturned. Its further contention that it is not able to commence the reconsideration until the appeal is resolved,<sup>27</sup> indeed leaves no doubt as to the Prosecution's position, namely that it does not intend to take any steps in order to comply with the deadline at this stage.

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<sup>24</sup> See the "Decision on the Prosecutor's request for suspensive effect of her appeal under article 81(3)(c)(ii) of the Statute and directions on the conduct of the appeal proceedings" (Appeals Chamber), [No. ICC-02/11-01/15-1243 OA 14](#), 18 January 2019, para. 20 (footnote omitted) quoting the "Decision on suspensive effect" (Appeals Chamber), [No. ICC-01/13-43 OA](#), 6 August 2015, para. 7, referring to the "Decision on the Prosecutor's urgent request for suspensive effect of the 'Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido' of 21 October 2014" (Appeals Chamber), [No. ICC-01/05-01/13-718 OA9](#), 22 October 2014, para. 5.

<sup>25</sup> See the Omnibus Request, *supra* note 2, para. 13.

<sup>26</sup> *Idem*, para. 14.

<sup>27</sup> *Ibid.*, para. 15.

20. It is indeed regrettable that the Prosecution once again demonstrates its open disagreement and reluctance to comply with a decision of the Pre-Trial Chamber, a decision that continues to have binding effect, notwithstanding the present appeal.

21. In this regard, the Principal Counsel wishes to recall that in determining whether to exercise its discretion in favour of suspensive effect, it is important that the Appeals Chamber “*consider all circumstances that are relevant to the exercise of [its] discretion*”.<sup>28</sup> The Appeals Chamber should thus not lose sight of the fact that the Prosecution’s submissions are made against the backdrop of its earlier (and continued) wilful non-compliance with Pre-Trial Chamber I’s decision of 16 July 2015<sup>29</sup> which prompted the imposition of the six-month deadline.<sup>30</sup>

22. If the Appeals Chamber were to grant suspensive effect of the deadline, it would effectively allow the Prosecution to derive a benefit from its non-compliance with judicial decisions, and implicitly approve its current refusal to implement the order contained in the 15 November 2018 Decision.

23. Moreover, allowing the Prosecution to benefit from its own non-compliance will only further frustrate the interests and rights of victims participating in these proceedings. Said victims have been waiting almost six years since the referral of the situation in May 2013 to obtain answers and exercise their rights.

24. The proceedings in the present situation as a whole have continuously been affected by the Prosecution’s delaying tactics resulting in significant interruptions and *de facto* suspensions of its activities. Another adjournment cannot under any

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<sup>28</sup> See the “Decision on the Prosecutor’s request for suspensive effect of her appeal under article 81(3)(c)(ii) of the Statute and directions on the conduct of the appeal proceedings” *supra* note 24, para. 21 (footnotes omitted).

<sup>29</sup> See the 15 November 2018 Decision, *supra* note 16, paras. 83-85 and 119. See also the “Partly Dissenting Opinion of Judge Péter Kovács” to the 15 November 2018 Decision, [No. ICC-01/13-68-Anx](#), para. 3.

<sup>30</sup> See the 15 November 2018 Decision, *idem*, paras. 96 and 108.

circumstances be justified, let alone outweigh the victims' substantive rights to truth and access to justice. Indeed, as recognised by Pre-Trial Chamber I:

*"it is [...] necessary for the victims to be informed promptly as to whether or not they will be in a position to exercise their rights before this Court, a matter which depends entirely on the Prosecutor's decision of whether to open an investigation. Extended preliminary examinations affect the rights of victims and maintain them in a state of uncertainty which is prejudicial".<sup>31</sup>*

**FOR THE FOREGOING REASONS**, the Principal Counsel respectfully requests the Appeals Chamber to reject the Prosecution's request for suspensive effect, and to grant all parties and participants in these proceedings the same time and page limits as regards their submissions on the merits of the pending appeal.



**Paolina Massidda**  
**Principal Counsel**

Dated this 24<sup>th</sup> day of January 2019

At The Hague, The Netherlands

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<sup>31</sup> *Idem*, para. 120.