

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/13 OA2

Date: 18 April 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 AND THE KINGDOM OF
CAMBODIAN**

Public document

Order on the conduct of the hearing before the Appeals Chamber

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

States Representatives
Mr Rodney Dixon

Legal Representatives of Victims
Mr Rodney Dixon

The Office of Public Counsel for Victims
Ms Paolina Massidda

REGISTRY

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of the Office of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’ of 15 November 2018 (ICC-01/13-68),

Noting the ‘Scheduling order for a hearing before the Appeals Chamber’ of 12 April 2019 (ICC-01/13-93), in which the Appeals Chamber informed the parties and participants that a hearing would be held on 1 May 2019 and that further directions on the schedule of the hearing and conduct of the proceedings will be issued in due course,

Issues the following

ORDER

1. At the hearing, the Appeals Chamber invites the parties and participants to address the issues as outlined below. The questions are intended to guide the parties and participants in their submissions and need not be answered individually.

A. Group A – Applicable law and judicial power

- a. What, if any is the relationship and effect of the Appeals Chamber’s 2015 decision¹ on the present appeal proceedings (in particular the effect of the reasoning of the Majority for dismissing the appeal *in limine*)?
- b. As a general principle of law, judicial decisions of the Court shall be respected and complied with. The Appeals Chamber notes paragraph 13 of the Prosecutor’s decision² (hereinafter: ‘Prosecutor’s Decision of 30 November 2017’), in which the Prosecutor contends, *inter alia*, that based on her independent analysis of the law ‘the Prosecution cannot concur with the majority of the Pre-Trial Chamber’; that she

¹ ‘Decision on the admissibility on 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’, 6 November 2015, [ICC-01/13-51](#).

² Final decision of the Prosecution concerning the “Article 53(1) Report” (ICC-01/13-6-AnxA), date 6 November 2014’, [ICC-01/13-57-Anx1](#).

‘respectfully disagrees with the legal reasoning in the [Pre-Trial Chamber’s request] concerning: the standard applied by the Prosecution under article 53(1), the standard of review applied by the Pre-Trial Chamber under 53(3), and the considerations relevant to the substantive analysis carried out by the majority’, and that she ‘cannot simply follow the approach of the [Pre-Trial Chamber’s request]’.³

- i. In light of the abovementioned general principle of law, does the Prosecutor’s contention amount to non-compliance with the Pre-Trial Chamber’s request for reconsideration, which is a judicial decision that has force and effect?
 - ii. When requested by the Pre-Trial Chamber to reconsider a decision not to initiate an investigation, rule 108 of the Rules of Procedure and Evidence (the ‘Rules’) stipulates that the Prosecutor “shall reconsider that decision as soon as possible’. In reconsidering the decision does the Prosecutor have discretion to disregard the directions of the Pre-Trial Chamber in this respect?
- c. What would be the consequence of non-compliance by a party with a judicial decision of the Court and the effect of regulation 29 of the Regulations of the Court in this regard?
 - d. What, if any, was the legal basis for the Government of the Union of Comoros (the ‘Comoros’) to seize Pre-Trial Chamber I on 23 February 2018 with a request for a second review of the Prosecutor’s Decision of 30 November 2017?
 - e. Under article 53(3)(a) of the Statute, the Pre-Trial Chamber is empowered to ‘review’ a decision of the Prosecutor not to proceed with an investigation. Is the power to review in this context akin to the power of the Appeals Chamber under article 83(2) of the Statute?
 - f. May the Pre-Trial Chamber resort to its ‘inherent powers’ to overturn a final decision of the Prosecutor pursuant to article 53(3)(a) of the Statute and rule 108 of the Rules?

³ [Prosecutor’s Decision of 30 November 2017](#), para. 13.

- g. In deciding whether to initiate an investigation, article 53(1) of the Statute, at paragraphs (a) and (b), requires the Prosecutor to assess whether ‘a crime within the jurisdiction of the Court has been or is being committed’ and if ‘[t]he case is or would be admissible under article 17’. In this scenario:
- i. Who is empowered to make a final ruling on jurisdiction or admissibility – the Prosecutor or the relevant Chamber?
 - ii. Does the Prosecutor and the Chamber have the same power in this respect?
- h. What is the relationship, if any, between the wording of article 53(1)(b) of the Statute, which stipulates that ‘*the Prosecutor shall consider whether*’ [t]he case is or would be admissible under article 17’, and the wording of article 17(1) of the Statute, which stipulates that ‘[...] *the Court shall determine* that a case is inadmissible [...]’? [Emphasis added.] Does the word ‘consider’ in article 53(1)(b) endow the Prosecutor with the same authority as that of the Chamber to ‘determine’ whether a case is inadmissible under article 17 of the Statute?
- i. Are the Prosecutor’s actions, generally, and her decision pursuant to rule 108 of the Rules, in particular, administrative or judicial in nature?
 - j. If judicial in nature, does the final decision have the effect of being *res judicata*?
- B. Group B – The Prosecutor’s implementation of the request for reconsideration
- a. Did the Prosecutor’s Decision of 30 November 2017, *effectively and not just formally*, address the five errors identified by the Pre-Trial Chamber?
 - b. In assessing the scale of the crimes, did the Prosecutor apply a differential standard by relying on factors in the *Abu Garda* case that appear to treat the victims of that case better than the victims of the flotilla and those in Gaza?
 - c. In the *Abu Garda* case the Prosecutor based her assessment of the impact of the alleged crimes not only on the peacekeepers and their families but

extended it to include a ‘large number of civilians deprived of protection more widely because of the disruption to the peacekeepers’ operations’.⁴ In contrast in the case at hand, the Prosecutor limited her assessment of the impact of the crimes to the flotilla passengers alone and excluded the victims in Gaza. What is the reason for this differential assessment and how does the Prosecutor’s approach comport with article 21(3) of the Statute and recognised International Human Rights Law?

- d. Is the Prosecutor’s assessment of the crimes in this case in contradiction with her position regarding the crimes alleged to have taken place in Myanmar and Bangladesh?
- e. With regard to the Prosecutor’s argument, at paragraph 141 of the Prosecutor’s Decision of 30 November 2017 that the alleged misconduct conducted on Israeli soil cannot be associated with the alleged crimes committed aboard the *Mavi Marmara* because:

In such circumstances, the alleged subsequent misconduct, even if true, cannot be rationally associated with the identified crimes aboard the *Mavi Marmara*, for the purpose of assessing the gravity of any potential case arising from the situation. While there is a continuum between the victims of the alleged conduct, the link between the groups of alleged perpetrators is tenuous - they are united only by their nationality, their service to the Israeli government, and the allegations that some persons in these groups mistreated detainees. The conduct of such unrelated groups has very little or no probative value in showing a reasonable basis to believe that there was a plan or policy to commit crimes aboard the *Mavi Marmara*.⁵

Is the Prosecutor’s contention in this case in direct contradiction, not only with the notion of continuing crimes but especially with her argument in the *Myanmar* situation that the “‘conduct” requirement’ in article 12(2)(a) of the Statute ‘means only that “at least one legal element of an article 5 crime” must occur on the territory of a State Party’?⁶

- f. In the absence of a substantial investigation, was the Prosecutor correct in making a ‘conditional determination of the lawfulness of the

⁴ [Prosecutor’s Decision of 30 November 2017](#), para. 78.

⁵ [Prosecutor’s Decision of 30 November 2017](#), para. 141.

⁶ See ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’, 9 April 2018, [ICC-RoC46\(3\)-01/18-1](#), para. 28.

interception of the flotilla’ given that the UN Human Rights Council found that the interception of the flotilla was per se unlawful?⁷

C. Group C – The standard of ‘reasonable basis’ to initiate an investigation

- a. Is the standard applied by the Prosecutor in deciding not to initiate an investigation in the matter at hand consistent with the ‘reasonable basis’ standard under article 15 of the Statute?
- b. Did the Prosecutor abuse her discretion under article 15 of the Statute when, having some ‘information on crimes within the jurisdiction of the Court’, she decided not to open an investigation, especially in circumstances where the situation was referred by a State Party that has jurisdiction over the crimes?

D. Group D – Complementarity and the duty to end impunity

- a. Is the Comoros or Palestine able to effectively investigate the alleged crimes identified in the Comoros’ referral and prosecute the alleged perpetrators?
- b. Is there any other State that is able and willing to investigate the crimes identified in the Comoros’ referral?
- c. If not, has the complementarity requirement been met under paragraph 10 of the Preamble read with article 1 and 17 of the Statute?
- d. Does a decision not to proceed with an investigation imply a denial of justice and a violation of the internationally recognised human right of access to justice?
- e. As noted in the Preamble to the Statute, the object and purpose of establishing a permanent international Criminal Court was ‘to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’. In the matter at hand, by deciding not to

⁷ [Prosecutor’s Decision of 30 November 2017](#), para. 156, referring, *inter alia*, to ‘Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute’, 30 March 2015, [ICC-01/13-14-Red](#), para. 92. *See also* Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, [UN Doc. A/HRC/15/21](#), 27 September 2010, paras 261-262.

proceed with an investigation has the Prosecutor breached the object and purpose of the Statute especially in circumstances where a State Party has referred the situation involving alleged war crimes and crimes against humanity?

2. The parties and participants will be invited to address the Appeals Chamber on the issues set out above as follows:

In relation to Group A:

- i. The Prosecutor (25 minutes)
- ii. The Government of the Union of the Comoros (25 minutes)
- iii. The Legal Representative of the Victims (10 minutes)
- iv. The Office of Public Counsel for Victims (10 minutes)
- v. The Prosecutor (5 minutes)
- vi. The Government of the Union of Comoros (5 minutes)

In relation to Group B:

- i. The Prosecutor (30 minutes)
- ii. The Government of the Union of Comoros (30 minutes)
- iii. The Legal Representative of the Victims (15 minutes)
- iv. The Office of Public Counsel for Victims (15 minutes)
- v. The Prosecutor (5 minutes)
- vi. The Government of the Union of Comoros (5 minutes)

In relation to Group C and D:

- i. The Prosecutor (15 minutes)
- ii. The Government of the Union of Comoros (15 minutes)

- iii. The Legal Representative of the Victims (10 minutes)
 - iv. The Office of Public Counsel for Victims (10 minutes)
 - v. The Prosecutor (5 minutes)
 - vi. The Government of the Union of Comoros (5 minutes)
3. Additional questions may be put to the parties and participants from the bench in respect of the above issues or any other relevant issues.
 4. At the end of the hearing, the Legal Representative of Victims and the Office of Public Counsel for Victims will be invited to make brief final submissions of 10 minutes each. Thereafter, the Prosecutor and the Government of the Union of Comoros will also be invited, to make final submissions of 10 minutes each.

Done in both English and French, the English version being authoritative.



Judge Solomy Balungi Bossa
Presiding Judge

Dated this 18th day of April 2019

At The Hague, The Netherlands