

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/13**

Date: **22 September 2020**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Péter Kovács, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Reine Adélaïde Sophie Alapini-Gansou

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

**Public Document**

**Application on behalf of the Government of the Union of the Comoros for Leave to Appeal the “Decision on the ‘Application for Judicial Review by the Government of the Comoros’” of 16 September 2020**

**Source:** Rodney Dixon QC and Haydee Dijkstal, and Stoke & White Ltd (London) on behalf of the Government of the Union of the Comoros

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

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor

**Counsel for the Defence**

**Legal Representatives of Victims**  
Mr Rodney Dixon QC  
Ms Haydee Dijkstal

**Legal Representatives of the Applicant**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**  
Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**  
Mr Rodney Dixon QC  
Ms Haydee Dijkstal

**Amicus Curiae**

**REGISTRY**

---

**Registrar**  
Mr Peter Lewis

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## **I. INTRODUCTION**

1. Counsel for the Government of the Union of the Comoros, hereby file this application for leave to appeal against the “Decision on the ‘Application for Judicial Review by the Government of the Comoros’” of 16 September 2020.<sup>1</sup>
2. This application for leave to appeal is made pursuant to Article 82(1)(d) of the Statute, Rule 155, and Regulations 33 and 65. It is also submitted pursuant to Article 82(1)(d) in accordance with the Appeals Chamber’s Decision of 6 November 2015.<sup>2</sup>
3. The Government of Comoros submits that the Pre-Trial Chamber committed an error of law and procedure by deciding not to request the Prosecution to reconsider its decision not to open an investigation, despite its clear finding that the Prosecution failed genuinely to conduct its latest reconsideration<sup>3</sup> in accordance and compliance with the Pre-Trial Chamber’s decision of 16 July 2015.<sup>4</sup> The Government of the Comoros submits that this error within the Decision of 16 September 2020 gives rise to two appealable issues – as set out below – which significantly affect the fair and expeditious conduct of the proceedings, and for which the Government seeks leave to appeal.

## **II. APPLICABLE LAW AND JURISPRUDENCE**

4. Pursuant to Article 82(1)(d) of the Statute the Applicant is required to demonstrate that the impugned decision concerns issues which would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

---

<sup>1</sup> Decision on the ‘Application for Judicial Review by the Government of the Comoros’, ICC-01/13-111, 16 September 2020 (*hereinafter* “Decision of 16 September 2020”).

<sup>2</sup> 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, ICC-01/13-51, 6 November 2015, paras. 50-52, 66.

<sup>3</sup> Final decision of the Prosecutor concerning the ‘Article 53(1) Report’ (ICC-01/13-06-AnxA), dated 6 November 2014, as revised and refiled in accordance with the Pre-Trial Chamber’s request of 15 November 2018 and the Appeals Chamber’s judgment of 2 September 2019, ICC-01/13-99-Anx1, 2 December 2019 (*hereinafter* “Reconsideration Decision of 2 December 2019”).

<sup>4</sup> 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, 16 July 2015 (*hereinafter* “Decision of 16 July 2015”).

5. The Appeals Chamber has stated that “the object of paragraph (d) of article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.”<sup>5</sup> The Appeals Chamber clarified that a “wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances the proceedings will not be advanced but on the contrary they will be set back.”<sup>6</sup> The Court has also found that “mapping a course of action along the right lines provides a safety net for the integrity of the proceedings.”<sup>7</sup>
6. The Appeals Chamber has found that the “subject-matter of an appealable decision” ... “is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”, and “is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”<sup>8</sup>
7. The issue within the impugned decision need not be “confined to trial proceedings but [may] extend to pre-trial proceedings as well as the investigation of crime.”<sup>9</sup> The Appeals Chamber has explained the purpose of Article 82(1)(d) saying: “[p]urging the pre-trial process of errors ... is designed as a safeguard for the integrity of the proceedings” as a “[b]reach of or deviation from the rules of a fair trial at the pretrial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial.”<sup>10</sup>
8. As submitted below, the issues identified in this application are ones for which leave to appeal should be granted in light of the applicable case law of the ICC.

---

<sup>5</sup> Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 19 (*hereinafter* “AC Decision of 13 July 2006”).

<sup>6</sup> AC Decision of 13 July 2006, para. 16.

<sup>7</sup> AC Decision of 13 July 2006, para. 15; *Prosecutor v. Banda and Jerbo*, Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence', ICC-02/05-03/09-179, 13 July 2011, para. 22.

<sup>8</sup> AC Decision of 13 July 2006, para. 9.

<sup>9</sup> AC Decision of 13 July 2006, para. 11.

<sup>10</sup> AC Decision of 13 July 2006, para. 11.

### III. SUBMISSIONS

9. The Government of Comoros submits that the Pre-Trial Chamber committed an error of law and procedure by deciding “not to request the Prosecutor to reconsider her 2014 Decision not to Investigate, notwithstanding the Chamber’s finding that the 2019 Decision not to Investigate is not the result of a genuine reconsideration.”<sup>11</sup> As a result, the Government of the Comoros identifies two issues arising from the Pre-Trial Chamber’s Decision of 16 September 2020 for which it seeks certification to appeal.

#### *(1) The first proposed issue*

10. The Government of the Comoros submits that the Pre-Trial Chamber committed an error of law and procedure by deciding against requesting that the Prosecution reconsider its decision not to investigate after finding it had not conducted its reconsideration genuinely and in accordance with the Chamber’s decision of 16 July 2015. As a result, the following issue arises from the Pre-Trial Chamber’s decision:

*Whether the Pre-Trial Chamber was in error for deciding not to ask the Prosecution to reconsider its decision, upon finding that the Prosecution has failed to genuinely reconsider its decision not to investigate in accordance with the Pre-Trial Chamber’s decision of 16 July 2015.*

11. The Government of the Comoros notes the conclusive and decisive nature with which the Pre-Trial Chamber found that the Prosecution, within its latest decision not to investigate,<sup>12</sup> “has not *genuinely* reconsidered [its] decision.”<sup>13</sup> In so finding, the Pre-Trial Chamber determined that the Prosecution failed to correct errors formerly identified by the Chamber and committed new errors; stating that:

“The Prosecutor has: (i) failed to apply the ‘reasonable basis to believe’ standard as interpreted by the Chamber; (ii) made premature determinations with regard to the scope of the potential cases and the nature and extent of the victimisation; (iii) failed to take into account factors and/or information relevant to the gravity assessment as

---

<sup>11</sup> Decision of 16 September 2020, para. 106.

<sup>12</sup> Reconsideration Decision of 2 December 2019.

<sup>13</sup> Decision of 16 September 2020, para. 102.

instructed by the Chamber; and (iv) relied on considerations that are not relevant to the gravity assessment or to the specific factor concerned.”<sup>14</sup>

12. The Pre-Trial Chamber further found that the Prosecution “abused [its] margin of appreciation”, displayed consistent “resistance to adopt the standard as interpreted by the Chamber”, and approached its reconsideration in a manner which “undermines the Chamber’s power to request the Prosecution to take into account certain factors and/or information.”<sup>15</sup>
13. Jurisprudence in this case establishes that the function of the Pre-Trial Chamber’s power to judicially review the Prosecution’s latest decision not to investigate is to “establish[] whether the Prosecutor carried out the reconsideration in accordance with the pre-trial chamber’s request for reconsideration.”<sup>16</sup> If the Prosecution has failed to do so, its decision not to investigate is not considered final - allowing the Pre-Trial Chamber “to ‘set aside’ [the Prosecution’s] ‘final’ decision and require [it] to further consider [its] initial decision.”<sup>17</sup> Such a finding as to the Prosecution’s failures and non compliance, triggers the Pre-Trial Chamber’s duty and power “to give effect to article 53(3)(a) of the Statute” and to request the Prosecution to reconsider its decision.<sup>18</sup> Indeed, the Pre-Trial Chamber has previously found that “[u]pon review, the Chamber *must* request the Prosecutor to reconsider her decision not to investigate if it concludes that the validity of the decision is materially affected by an error, whether it is an error of procedure, an error of law, or an error of fact.”<sup>19</sup>
14. The Pre-Trial Chamber’s decision of 16 September 2020 found exactly that – that the Prosecution’s decision not to investigate within its latest decision on reconsideration was materially affected by errors and failures to conduct a genuine reconsideration. For example, the Pre-Trial Chamber Decision of 16 September 2020 found that “the Prosecutor has failed to correct the errors identified by the Chamber and has also

---

<sup>14</sup> Decision of 16 September 2020, para. 102.

<sup>15</sup> Decision of 16 September 2020, paras. 103, 104.

<sup>16</sup> Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, ICC-01/13-98, 2 September 2019, para. 60 (hereinafter “*AC Judgment of 2 September 2019*”).

<sup>17</sup> AC Judgment of 2 September 2019, para. 61.

<sup>18</sup> Decision of 16 September 2020, para. 25.

<sup>19</sup> 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, 16 July 2015, para. 12 (emphasis added).

committed new errors”, and that these failures have “materially affected” the Prosecution’s conclusions within its Reconsideration Decision of 2 December 2019.<sup>20</sup> The Pre-Trial Chamber was therefore in error not to request the Prosecution to reconsider again its decision not to investigate.

15. The Chamber’s error significantly affects the fair and expeditious conduct of the proceedings, and raises an issue of fundamental importance as to the application and effectiveness of Article 53(1)(a). The very reason for this article’s inclusion in the Statute would be undermined if it were permissible for the Pre-Trial Chamber to decide not to require the Prosecution’s reconsideration after concluding that the Prosecution’s latest decision on reconsideration is materially affected by its failure to genuinely reconsider its decision in accordance with the Pre-Trial Chamber Decision of 16 July 2015.
16. The Chamber’s error significantly affects the conduct of the proceedings by allowing the Prosecution’s latest decision to stand as the final decision – thus closing the proceedings in the Situation. This consequence would be despite the Pre-Trial Chamber’s finding that the Prosecution failed to genuinely reconsider its decision and correct identified errors; a finding which by its nature thus prevents the Prosecution’s Reconsideration Decision of 2 December 2019 from truly constituting a ‘final decision’.
17. This raises the issue of whether the Pre-Trial Chamber may decline requesting the Prosecution to reconsider its decision not to investigate again considering its clear finding as to the Prosecution’s continued errors and failure to genuinely conduct its reconsideration.
18. The proper determination of this issue significantly affects the conduct of the proceedings as it concerns the implementation and effectiveness of Article 53(1)(a), and whether the Pre-Trial Chamber’s error effectively negates the purpose of Article 53(3)(a) to ensure that a decision not to investigate is not allowed to stand as final if it is based on errors of law, fact or procedure. The Appeals Chamber has previously found that the “effectiveness of the procedure under article 53(3)(a) of the Statute as a whole”

---

<sup>20</sup> Decision of 16 September 2020, paras. 60, 62.

should not be negated by the *Prosecutor's decision* to ignore the basis of the Pre-Trial Chamber's request for reconsideration; namely its identification of errors materially affecting the Reconsideration Decision.<sup>21</sup> Neither should the effectiveness of Article 53(3)(a) be undermined by the *Pre-Trial Chamber's own decision* not to request the Prosecution to reconsider.

19. The Pre-Trial Chamber's error significantly affects the rights of State Parties under Article 53(3)(a) to seek judicial review of a decision not to investigate the very situation it referred to the Court and asked the Court to investigate. Allowing a decision, which has been found to be materially affected by errors, stand as final and not requiring the Prosecution to reconsider the decision and correct the errors identified, negates the State Party's right of recourse before the Court. In the Pre-Trial Chamber's own words – "a decision issued by the Pre-Trial Chamber under article 53(3)(a) of the Statute must lead to an obligation of compliance on the part of the Prosecutor in order to give effect to a State Party's opportunity to challenge the Prosecutor's decision not to proceed with an investigation, as explicitly recognised under the Statute."<sup>22</sup>
  
20. Importantly, the Pre-Trial Chamber's error also significantly affects the rights of the victims, who have sought justice for the crimes committed against them for over 7 years before the Court. By not requesting the Prosecution to reconsider a decision marred with errors of law and fact, the Pre-Trial Chamber has prejudiced the victims' "internationally recognized human rights ... with regard to the conduct and result of [the Prosecution's] preliminary examination, especially the rights of victims to know the truth, to have access to justice and to request reparations."<sup>23</sup>
  
21. Resolution by the Appeals Chamber of this issue would materially advance the proceedings by determining whether the Pre-Trial Chamber was in error to not request the Prosecution to reconsider its decision on opening an investigation based on the Chamber's findings, and would clarify whether further steps should be taken to ensure compliance with the Chamber's decision of 16 July 2015.

---

<sup>21</sup> AC Judgment of 2 September 2019, para. 61.

<sup>22</sup> Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros', ICC-01/13-68, 15 November 2018, para. 100.

<sup>23</sup> Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros', ICC-01/13-68, 15 November 2018, para. 120.



**(2) *The second proposed issue***

22. The Government of the Comoros submits that the error made by the Pre-Trial Chamber arises from its findings about the implications of the Appeals Chamber’s Judgment of 2 September 2019 for the Pre-Trial Chamber’s power to request the Prosecution to reconsider its decision not to investigate. Accordingly, there is a second issue for which leave to appeal is requested, namely:

*Whether the Appeals Chamber’s Judgment of 2 September 2019 prevents the Pre-Trial Chamber from exercising its power to direct the Prosecution to reconsider its decision in respect of all identified errors, and should guidance be provided by the Appeals Chamber in this regard.*

23. The Pre-Trial Chamber explained that the reason for not requesting the Prosecution to reconsider its decision is because the Appeals Chamber’s Judgment of 2 September 2019 provides no clear guidance on this point.<sup>24</sup> The Pre-Trial Chamber found that in light of the Appeals Chamber’s decision it is unclear “whether and to what extent it [the Pre-Trial Chamber] may request the Prosecutor to correct errors related to questions of law and the application of the law to the facts.”<sup>25</sup> The Pre-Trial Chamber noted that “questions of law are inextricably linked to the application of the law to the facts,”<sup>26</sup> and therefore, in order properly to direct the Prosecution to reconsider its decision and correct the errors identified, it has to be able to direct the Prosecution on the application of the law to the facts. The Pre-Trial Chamber highlighted that with regard to the errors the Prosecution made as to assigning weight to factors within its gravity analysis that “questions of law and the application of the law to the facts are intertwined with

---

<sup>24</sup> Decision of 16 September 2020, para. 105-111. The Pre-Trial Chamber summarised the Appeals Chamber’s guidance as: “when requesting the Prosecutor to reconsider her decision not to proceed with an investigation pursuant to article 53(3)(a) of the Statute, the Chamber may only direct the Prosecutor: (i) as to the interpretation of the applicable law; (ii) to consider certain available information; or (iii) to consider certain factors or information related thereto in the assessment of the gravity of the potential cases. The Chamber may not direct the Prosecutor as to: (i) how to apply the law to the available information; (ii) how she should analyse the available information and what factual findings to make; and (iii) what weight she should attach to the different factors relevant to the gravity assessment.”

<sup>25</sup> Decision of 16 September 2020, para. 107.

<sup>26</sup> Decision of 16 September 2020, para. 108.

questions related to the weight that the Prosecutor should attach to different factors”<sup>27</sup>. The Pre-Trial Chamber thus found that it is unclear as to “whether and to what extent it may request the Prosecutor to correct errors related to her assessment of the factors relevant to the gravity requirement.”<sup>28</sup>

24. Importantly, the Pre-Trial Chamber attributed its decision not to request the Prosecution to reconsider its Reconsideration Decision of 2 December 2020 to the fact that “the current jurisprudence of the Appeals Chamber does not establish with sufficient clarity the exact distribution of prerogatives between the Prosecutor the pre-trial chamber in article 52(3)(a) proceedings”, thus leaving the Pre-Trial Chamber in a position where it is uncertain of the scope of its authority to direct the Prosecution on reconsideration when issues of law and fact are inextricably intertwined and linked.<sup>29</sup>
25. The Government of the Comoros submits that the Pre-Trial Chamber’s overall error of not requesting the Prosecution to reconsider its decision of 2 December 2019 raises the issue of the proper interpretation of the Appeals Chamber’s guidance in respect of the Pre-Trial Chamber’s powers under Article 53(3)(a), and the effect this guidance has on the Pre-Trial Chamber’s ability to carry out its duties under Article 53(3)(a), as well as whether further guidance is required from the Appeals Chamber in this regard. This issue requires the Appeals Chamber’s intervention in order to address the guidance it gave in its Judgment of 2 September 2019, and particularly the uncertainty it has caused about the Pre-Trial Chamber’s power to ensure the Prosecution’s genuine reconsideration of errors both as to law and fact.
26. The proper determination of this issue significantly affects the conduct of the proceedings as it concerns whether Article 53(1)(a) can be given full effect. Not only has this issue resulted in the Pre-Trial Chamber declining to request the Prosecution’s further reconsideration of its latest decision not to investigate – effectively ending the proceedings and affecting the rights of the State Party and victims (as set out above) – but without the Appeals Chamber clarification of its guidance as to the Pre-Trial Chamber’s power to direct the Prosecution on errors involving issues of both law and

---

<sup>27</sup> Decision of 16 September 2020, para.109.

<sup>28</sup> Decision of 16 September 2020, para. 110.

<sup>29</sup> Decision of 16 September 2020, para. 111.

fact, there is the real risk that all future proceedings under Article 53(3)(a) will confront the same uncertainty, which negates the purpose and effectiveness of Article 53(3)(a).

27. Resolution by the Appeals Chamber as to the issue of the Pre-Trial Chamber's powers of direction under Article 53(3)(a) would materially advance the proceedings by providing clarity to the Pre-Trial Chamber so that it is in a position effectively to exercise its power and duty to direct the Prosecution on reconsideration when errors of both law and fact have been identified.

#### **IV. CONCLUSION**

28. For all of these reasons the Government of the Comoros respectfully requests the Pre-Trial Chamber to grant leave to appeal in respect of the issues identified in this Application.



---

**Rodney Dixon QC**  
**Haydee Dijkstal**

**Counsel on behalf of the Government of the Union of the Comoros**

Dated 22 September 2020  
London