

**Cour
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**International
Criminal
Court**

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Date: **29 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 THE REGISTERED VESSELS OF THE UNION OF THE
COMOROS, THE HELLENIC REPUBLIC AND THE KINGDOM OF CAMBODIA**

Public

Victims' Response to the "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 2016"

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. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims, acting as legal representative of the unrepresented victims¹ supports the “Application on behalf of the Government 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” (the “Request”).²

2. The Principal Counsel contends that both issues identified by the Government of the Union of the Comoros (the “Comoros”) in its Request should be certified for appeal. Both issues fulfil the requirements laid down in article 82(1)(d) of the Rome Statute (the “Statute”) in that they constitute appealable issues that significantly affect the fair and expeditious conduct of the proceedings and for which an immediate resolution by the Appeals Chamber is necessary to materially advance the proceedings.

3. Additionally, the Principal Counsel respectfully invites the Chamber to consider amending the Request, so as to include the question of applicable sanctions within the scope of appellate review.

4. The resolution of said issues is particularly justified and necessary in light of the Pre-Trial Chamber’s indication that guidance from the Appeals Chamber is needed.³

¹ See the “Decision on the Victims’ Participation in the Situation” (Pre-Trial Chamber I), [No. ICC-01/13-18](#), 24 April 2015, para. 17; and the “Decision on the Requests for Withdrawal of the Legal Representative of Victims pursuant to Regulation 82 of the Regulations of the Court” (Pre-Trial Chamber I), [No. ICC-01/13-54](#), 26 September 2016.

² See the “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, [No. ICC-01/13-112](#), 22 September 2020 (the “Request”).

³ See the “Decision on the ‘Application for Judicial Review by the Government of the Comoros’”, [No. ICC-01/13-111](#), 16 September 2020 (the “Impugned Decision”), para. 110.

5. Should appellate intervention not be granted, the Victims' quest for justice would be prejudiced. Indeed, the Impugned Decision will conclude proceedings in the Situation of the Registered Vessels. Since the ruling the Chamber ultimately made stands in contrast with its substantive findings and indicates a degree of uncertainty about the applicable procedural framework, Victims deserve – at the very least - an authoritative ruling that does not leave any room for doubt and speculation.

II. PROCEDURAL HISTORY

6. On 15 November 2018, Pre-Trial Chamber I (the "Chamber") rendered its "Decision on the "Application for Judicial Review by the Government of the Union of the Comoros" (the "2018 Decision"), requesting the Prosecutor to reconsider her conclusion of 6 November 2014 and to *"notify the Chamber and those participating in the proceedings of her final decision no later than Wednesday 15 May 2019"*.⁴ On 21 November 2018, the Prosecution filed a request for leave to appeal the 2018 Decision.⁵

8. On 18 January 2019, the Chamber partly granted leave to appeal, certifying two of the three issues put forth by the Prosecution.⁶

9. On 2 September 2019, the Appeals Chamber affirmed the 2018 Decision,⁷ directed the Prosecutor to conduct a second review of the decision not to investigate

⁴ 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 "2018 Decision"), paras. 120-121.

⁵ 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.

⁶ 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.

⁷ See the "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'" (Appeals Chamber), [No. ICC-01/13-98](#), 2 September 2019 (the "2019 Judgment").

the Situation of the Registered Vessels, and to notify those participating in the proceedings of her conclusion by 2 December 2019 (the “2019 Judgement”).⁸

10. On 2 December 2019, the Prosecutor submitted its “Notice of Prosecutor’s Final Decision under rule 108(3), 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” (the “2 December 2019 Review”),⁹ maintaining her previous conclusion not to open an investigation into the Situation.

11. On 2 March 2020, the Comoros moved for a further judicial review and appropriate sanctions to be imposed on the Prosecutor in the circumstances.¹⁰

12. On 16 September 2020, the Chamber rendered its decision on the Comoros’ further request for judicial review (the “Impugned Decision”).¹¹ It found that the Prosecutor had not genuinely carried out her reconsideration¹² and that she had moreover committed new and further errors in her decision.¹³ However, the Chamber declined to order a further review, expressing its position that the Appeals Chamber’s jurisprudence was unclear as to the powers of the Pre-Trial Chamber to order a further reconsideration and to issue directions.¹⁴ It also considered the Comoros’ request for an imposition of sanctions to be moot.¹⁵

⁸ *Idem*, para. 96.

⁹ See the “Notice of Prosecutor’s Final Decision under rule 108(3), 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” containing the “Final Decision of the Prosecutor concerning the ‘Article 53(1) Report’ (ICC-01/13-6-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”, [No. ICC-01/13-99-Anx1](#), 2 December 2019 (the “2 December 2019 Review”).

¹⁰ See the “Application for Judicial Review by the Government of the Comoros”, [No. ICC-01/13-100](#), 2 March 2020.

¹¹ See the Impugned Decision, *supra* note 3.

¹² *Idem*, paras. 45, 71, 83, 94, 102.

¹³ *Idem*, paras. 38, 60, 71, 77.

¹⁴ *Idem*, para. 111.

¹⁵ *Idem*, para. 112.

13. On 22 September 2020, the Comoros requested leave to appeal the Impugned Decision.

III. SUBMISSIONS

A. *Applicable law*

14. A party seeking leave to appeal a decision falling within the ambit of article 82(1)(d) of the Statute must demonstrate that the criteria set out in that provision are met. It must show that the ruling gives rise to an issue that significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

15. The Appeals Chamber has defined an “*issue*” as “*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion*”.¹⁶ Moreover, said Chamber has ruled that “*the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue*”.¹⁷

16. Consequently, it must first be determined whether the purported “*issues*” in the Request are “*appealable issues*” within the meaning of article 82(1)(d) of the Statute as interpreted by the jurisprudence of the Court.

B. *Merits of the First Issue*

¹⁶ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, para. 9.

¹⁷ *Idem*, para. 20.

17. The Comoros identify two issues which allegedly constitute legal and procedural errors.¹⁸ The first issue is formulated as follows:

*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.*¹⁹

18. The identified subject clearly constitutes an issue arising from the Impugned Decision in that the Chamber found in favour of the merits of the Comoros' Application in all respects, except for the request for sanctions, and yet rejected the relief sought. The disparity between the substantive findings and the dispositive part of the ruling is significant and, therefore, gives rise to an 'issue' within the meaning of the applicable jurisprudence.

19. The Principal Counsel further agrees with the Comoros that the immediate resolution of said issue by the Appeals Chamber is necessary to materially advance the proceedings because without such resolution the Situation of the Registered Vessels will *de facto* and *de jure* terminate at this juncture. This course of events would not only end the Victims' quest for justice, but it would also do so on a muddled footing, raising questions about the effectiveness of the Rome Statute system as a whole.

¹⁸ See the Request *supra* note 2, paras. 3, 9.

¹⁹ *Idem*, para. 10.

C. Merits of the Second Issue

20. The second issue as formulated by the Comoros reads as follows:

*Whether the Appeals Chamber's Judgment of 2 September 2019 prevents the 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.*²⁰

21. The Principal Counsel shares the Comoros' view that the abovementioned constitutes an issue for the purposes of article 82(1)(d) of the Statute. It is indeed apparent from the Chamber's reasoning that, despite its unequivocal findings as to the Prosecutor's review and the lack of genuineness thereof, it refrained from granting the requested relief because the applicable legal basis was unclear in light of the September 2019 Judgment, and therefore further guidance from the Appeals Chamber was needed in this regard.²¹

22. As acknowledged by the Chamber itself, there exists an imminent need for clarification of the applicable procedure and of the attendant powers of the Pre-Trial Chamber.

23. Moreover, the resolution of the issue is necessary in light of the fact that the entire Situation of the Registered Vessels will be closed if the Impugned Decision stands. Said course of events will set an undesirable precedent in the jurisprudence of this Court and would greatly disappoint Victims seeking redress.

24. In this regard, the Principal Counsel notes that the Comoros in their further Application for Review moved not only for an order directed at the Prosecutor to

²⁰ *Idem*, para. 22.

²¹ See the Impugned Decision, *supra* note 3, para. 110.

reconsider her decision, but also for the imposition of sanctions justified by the repeatedly failure to comply with the Chambers' orders.

25. In the Impugned Decision, while finding that the Prosecutor abused her discretion and disregarded judicial orders,²² the Chamber declared the request for sanctions moot. The Principal Counsel contends that this conclusion constitutes a procedural error because said request was separate and distinct from the main application for review. Indeed, the question of sanctions was only linked to the Chamber's findings of whether or not the Prosecutor had heeded its directions. The Chamber found, that the Prosecutor had not done so.

26. The Principal Counsel therefore respectfully submits that the Chamber's non-ruling on the request for sanctions is a further issue emanating from the Impugned Decision, constituting a distinct procedural error. Yet, it is – in a broader sense – also linked to the Chamber's observed uncertainty regarding the appropriate relief for its substantial findings. In particular, the issue is connected to the effectiveness of article 53(3)(a) of the Statute and should form part of any guidance sought from the Appeals Chamber with respect to the division of powers and available remedies under that provision.

27. The Principal Counsel notes that *"pursuant to article 82(1)(d) of the Statute, it is for the chamber whose decision is impugned to determine – at its discretion – which issues are appealable and which are not"*.²³ Therefore, the Chamber may use its inherent powers to reformulate issues certified for appeal.²⁴ Indeed, the Chamber has the power to

²² *Idem*, para. 66.

²³ 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, para. 23.

²⁴ *Idem*, para. 39. See also, the "Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts" (Pre-Trial Chamber I), [No. ICC-01/12-01/18-130-tENG](#), 18 September 2018, para. 30; the "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court'" (Appeals Chamber),

“consider [...] arguments [...] outside the scope of the appeal if they [are] ‘intrinsicly linked’ to the issue on appeal”.²⁵ Further, the Appeals Chamber may clarify or amend issues as certified for appeal by the relevant Chamber *a quo*,²⁶ and has held that “participating victims may make observations as to alleged errors [...] even if these alleged errors were not specifically raised by the Prosecutor, as long as they affect the victims’ personal interests and remain within the ambit of the Prosecutor’s grounds of appeal”.²⁷

28. Consequently, the Principal Counsel respectfully requests the Chamber to make use of its inherent powers to either reformulate the Second Issue²⁸ or to alternatively amend the Request by including *proprio motu* a third, separate issue concerning the non-adjudication of the request for sanctions. In particular, the

[No. ICC-02/11-01/15-369](#), 18 December 2015, para. 18; and the “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’” (Appeals Chamber), [No. ICC-02/11-01/15-744](#), 1 November 2016, para. 13.

²⁵ See the “Judgment on Mr Bosco Ntaganda’s appeal against the decision reviewing restrictions on contacts of 7 September 2016” (Appeals Chamber), [No. ICC-01/04-02/06-1817-Red OA04](#), 8 March 2017, para. 85. See also, the “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’” (Appeals Chamber), [No. ICC-02/11-01/15-744 OA08](#), 1 November 2016, paras. 13 and 19.

²⁶ See *e.g.*, the “Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’” (Appeals Chamber), [No. ICC-01/04-01/07-476 OA02](#), 13 May 2008, para. 46; and the “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial’” (Appeals Chamber), [No. ICC-01/04-01/07-2288 OA11](#), 16 July 2010, paras. 56-57 and 88-90.

²⁷ See the “Decision on the Participation of Victims in the Appeal against Trial Chamber II’s ‘Jugement Rendu en Application de l’Article 74 du Statut’” (Appeals Chamber), [No. ICC-01/04-02/12-30 A](#), 6 March 2013, para. 41.

²⁸ See the “Decision on the Defence’s Applications for Leave to Appeal the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’” (Trial Chamber V(A), [No. ICC-01/09-01/11-1953-Red-Corr](#), 10 September 2015, para. 20. See also, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), [No. ICC-01/04-168](#), 13 April 2006, para. 20; the “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled ‘Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court’” (Appeals Chamber), [No. ICC-02/11-01/15-369](#), 18 December 2015, para. 18; and the “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’” (Appeals Chamber), [No. ICC-02/11-01/15-744](#), 1 November 2016, para. 13.

Chamber is invited to amend the Request by certifying a third issue for appeal, namely *whether the Pre-Trial Chamber, having found that the Prosecutor failed to genuinely reconsider her decision not to investigate in accordance with the Pre-Trial Chamber's decision of 16 July 2015, committed a procedural error in not pronouncing itself on the request for sanctions.*

29. Not only does this issue arise from the Impugned Decision, but its resolution would materially advance the proceedings, and further contribute to the clarification of article 53(3)(a) proceedings before this Court. If this matter is not addressed, there still remains the possibility for a similar outcome in the future, even if the Appeals Chamber would find in favour of the Comoros in relation to the two issues put forth in its Request.

30. Accordingly, as is evident from the fact that this litigation concerns the *third* review of the Prosecutor's decision, the matter of sanctions must be settled so as to create a mechanism capable of preventing a judicial stalemate situation which is detrimental to Victims' rights to truth and to justice.

IV. CONCLUSION

31. For the foregoing reasons, the Principal Counsel respectfully requests the Pre- Trial Chamber to (i) grant the Request and (ii) to consider amending the Request *proprio motu* so as to include the issue of applicable sanctions in the scope of the subjects certified for appeal.

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

Paolina Massidda
Principal Counsel

Dated this 29th day of September 2020

At The Hague, The Netherlands