



Original: English

No. **ICC-01/13**
Date: **21 December 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

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

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Rodney Dixon
Haydee Dijkstal

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

Paolina Massidda
Anne Grabowski

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

States Representatives

Rodney Dixon
Haydee Dijkstal

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER I of the International Criminal Court issues this Decision on the Request for Leave to Appeal the ‘Decision on the “Application for Judicial Review by the Government of the Comoros”’.

I. Procedural history

1. On 16 September 2020, the Chamber issued its ‘Decision on the “Application for Judicial Review by the Government of the Comoros”’ (the ‘Impugned Decision’), finding that the Prosecutor committed a series of errors in her assessment of the gravity of the potential cases arising from the situation and did not genuinely reconsidered her decision not to initiate an investigation.¹ Notwithstanding, the Chamber decided not to request the Prosecutor to reconsider her decision, as it was unclear based on the guidance received from the Appeals Chamber in its Judgment of 2 September 2019 (the ‘Appeals Chamber’s Judgment’),² whether and to what extent the Chamber had the power to direct the Prosecutor to correct the identified errors.³

2. On 22 September 2020, the Government of the Union of the Comoros (the ‘Comoros’) requested leave under article 82(1)(d) of the Rome Statute (the ‘Statute’) to appeal the Impugned Decision (the ‘Request’).⁴ The Comoros seeks leave to appeal on two issues:

Whether the Chamber was in error for deciding not to ask the Prosecutor to reconsider her decision, upon finding that she had failed to genuinely reconsider her decision not to investigate (the ‘First Issue’); and

Whether the Appeals Chamber’s Judgment prevents the Chamber from exercising its power to direct the Prosecutor to reconsider her decision in respect of all identified errors, and should guidance be provided by the Appeals Chamber in this regard (the ‘Second Issue’).⁵

¹ [ICC-01/13-111](#), paras 102-104.

² Appeals Chamber, [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.

³ [Impugned Decision](#), ICC-01/13-111, paras 106-111.

⁴ [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](#)”, ICC-01/13-112.

⁵ [Request](#), ICC-01/13-112, paras 3, 10, 22.

3. On 29 September 2020, the Chamber received the response of the victims represented by the Office of Public Counsel for Victims (the ‘OPCV’). The OPCV supports the Request and, additionally, invites the Chamber to consider amending the Second Issue, or adding a third issue as follows (the ‘OPCV Request’):

Whether the Chamber, having found that the Prosecutor failed to genuinely reconsider her decision not to investigate, committed a procedural error in not pronouncing itself on the Comoros’ request to impose sanctions on the Prosecutor for failing to reconsider her decision (the ‘Third Issue’).⁶

4. On the same day, the Prosecutor filed her response to the Request, submitting that it should be denied, as neither of the two issues raised by the Comoros meet the requirements of article 82(1)(d) of the Statute.⁷

II. Applicable law

5. The Chamber notes article 82(1)(d) of the Statute, rule 155 of the Rules of Procedure and Evidence and regulation 65 of the Regulations of the Court (the ‘Regulations’).

6. Mindful of the exceptional character of the remedy of the interlocutory appeal, the Chamber recalls that for leave to be granted, the following specific requirements must be met:⁸

(a) the decision must involve an issue that would significantly affect (i) the ‘fair’ *and* ‘expeditious’ conduct of the proceedings; *or* (ii) the outcome of the trial;

and

⁶ [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”](#), ICC-01/13-113, paras 1, 3, 24-31 (the ‘OPCV Response’).

⁷ [Prosecution Response to Request for Leave to Appeal the “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’” of 16 September 2020](#), ICC-01/13-114 (the ‘Prosecutor’s Response’).

⁸ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168 (the ‘Appeals Chamber Article 82(1)(d) Judgment’).

(b) in the view of the pre-trial chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

7. According to established jurisprudence, an appealable ‘issue’ is ‘an identifiable subject or topic requiring a decision for its resolution’ which ‘is essential for the determination of matters arising in the judicial cause under examination’. Importantly, an ‘issue’ must be distinguished from a question over which there is disagreement or a conflict of opinion.⁹

III. Analysis

A. First Issue

8. For the reasons that follow, the Chamber finds, by majority, Judge Reine Adélaïde Sophie Alapini-Gansou dissenting, that the First Issue is not an appealable issue.

9. The Comoros submits that the Chamber committed an error of law and procedure in deciding against requesting the Prosecutor to reconsider her decision.¹⁰ It argues that a finding by the Chamber that the Prosecutor failed to reconsider her decision in accordance with the Chamber’s directions triggers its duty and power to request the Prosecutor to reconsider said decision.¹¹ In other words, if the Chamber finds upon review that the Prosecutor’s decision is materially affected by an error, it must request her to reconsider.

10. As rightly highlighted by the Prosecutor,¹² the submissions made by the Comoros are no more than a disagreement with the Chamber’s determination. The Chamber specifically considered in the Impugned Decision the issue now raised by the Comoros, namely whether it had the power to request the Prosecutor to reconsider her decision in light of the errors identified by the Chamber. The Chamber examined the errors committed by the Prosecutor bearing in mind the jurisprudence of the Appeals Chamber and decided – based on the guidance received from the Appeals Chamber –

⁹ [Appeals Chamber Article 82\(1\)\(d\) Judgment](#), ICC-01/04-168, para. 9.

¹⁰ [Request](#), ICC-01/13-112, para. 10.

¹¹ [Request](#), ICC-01/13-112, para. 13.

¹² [Prosecutor’s Response](#), ICC-01/13-114, paras 13-14.

not to request the Prosecutor to reconsider said decision.¹³ In stating that the Chamber erred in deciding against requesting the Prosecutor to reconsider her decision, the Comoros is merely disagreeing with the Chamber's determination. Accordingly, the Chamber, by majority, rejects leave to appeal the First Issue.

B. Second Issue

11. For the reasons that follow, the Chamber finds, by majority, Judge Reine Adélaïde Sophie Alapini-Gansou dissenting, that the Second Issue does not arise from the Impugned Decision.

12. The Comoros submits that the Impugned Decision 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) of the Statute.¹⁴ It is evident from the manner in which the Second Issue is formulated that it does not arise from the Impugned Decision, but rather from the Appeals Chamber's Judgment. The Chamber recalls that the Second Issue, as formulated by the Comoros, reads: '*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 [...]*'.¹⁵ As submitted by the Comoros itself, the Second Issue 'requires the Appeals Chamber's intervention in order to *address the guidance it gave in its Judgment of 2 September 2019*'.¹⁶ However, as rightly advanced by the Prosecutor,¹⁷ article 82(1)(d) of the Statute may not be used to re-litigate issues that have already been decided by the Appeals Chamber. Accordingly, the Chamber, by majority, rejects leave to appeal the Second Issue.

C. Third Issue

13. The OPCV invites the Chamber to reformulate the Second Issue or add a third issue on whether the Chamber erred by declaring moot the Comoros' request to impose

¹³ [Impugned Decision](#), ICC-01/13-111, paras 105-111.

¹⁴ [Request](#), ICC-01/13-112, para. 25.

¹⁵ [Request](#), ICC-01/13-112, para. 22 (emphasis added).

¹⁶ [Request](#), ICC-01/13-112, para. 25 (emphasis added).

¹⁷ [Prosecutor's Response](#), ICC-01/13-114, para. 16.

sanctions on the Prosecutor for failing to reconsider her decision in accordance with the Chamber's directions.¹⁸

14. The Chamber notes that the OPCV raised this Third Issue in its response to the Request. The Chamber finds that such a request falls outside the scope of a response within the meaning of regulation 65(3) of the Regulations. If the OPCV wished to raise an issue for appeal, it should have sought to do so through a request for leave to appeal under article 82(1)(d) of the Statute. For these reasons, the Chamber rejects the OPCV Request.

¹⁸ [OPCV Response](#), ICC-01/13-113, para. 28.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request, by majority; and

REJECTS the OPCV Request.

Judge Reine Adélaïde Sophie Alapini-Gansou appends a partly dissenting opinion.

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



Judge Péter Kovács, Presiding Judge



Judge Marc Perrin de Brichambaut



**Judge Reine Adélaïde Sophie
Alapini-Gansou**

Dated this Monday, 21 December 2020

At The Hague, The Netherlands