

1 International Criminal Court

2 Appeals Chamber

3 Situation: Registered Vessels of the Union of the Comoros, the Hellenic Republic

4 and the Kingdom of Cambodia

5 ICC-01/13

6 Presiding Judge Solomy Balungi Bossa

7 Delivery of Judgment - Courtroom 1

8 Monday, 2 September 2019

9 (The hearing starts in open session at 10.30 a.m.)

10 THE COURT USHER: [10:30:47] All rise.

11 The International Criminal Court is now in session.

12 Please be seated.

13 PRESIDING JUDGE BOSSA: [10:31:32] Good morning, everyone.

14 Would the court officer please call the case before the Appeals Chamber.

15 THE COURT OFFICER: [10:31:43] Good morning, your Honour.

16 Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic

17 and the Kingdom of Cambodia, situation reference ICC-01/13.

18 And for the record, we are in open session.

19 PRESIDING JUDGE BOSSA: [10:32:00] Thank you.

20 My name is Solomy Bossa, and I am the Presiding Judge on the appeal arising from

21 the Situation on Registered Vessels of the Union of the Comoros, hereinafter called

22 "the Comoros", the Hellenic Republic and the Kingdom of Cambodia. The other

23 judges of the Appeals Chamber on this appeal are Judge Chile Eboe-Osuji, Judge

24 Howard Morrison, Judge Piotr Hofmański and Judge Luz del Carmen

25 Ibáñez Carranza.

1 I am joined today by legal staff of the Appeals Division, Mr Volker Nerlich,
2 Ms Natasha Naidoo, Ms Lucia Catani, Mr Juan Calderon Meza, Ms Nessma Bashi and
3 Ms Kalina Tzvetkova.

4 May I now ask the parties and participants to please introduce themselves for the
5 record, starting with the Office of the Prosecutor whose appeal we are deciding today.

6 MS BRADY: [10:33:12] Good morning, your Honours, everybody in the courtroom.

7 My name is Helen Brady. I'm the senior appeals counsel for the Prosecution. I'm
8 here today with Mr Matthew Cross, appeals counsel, and Ms Nivedha Thiru, assistant
9 appeals counsel. I'd also like to extend apologies on behalf of Mr James Stewart, the
10 Deputy Prosecutor, and Mr Fabricio Guariglia, the director of Prosecution Division,
11 because they are unable to be here today for the delivery of the judgment because of
12 outside engagements. Thank you.

13 PRESIDING JUDGE BOSSA: [10:33:45] Thank you.

14 May we now have the legal representative of the Government of the Union of the
15 Comoros introduce themselves.

16 MR DIXON: [10:33:57] Good morning, your Honour.

17 Rodney Dixon on behalf of the Government of the Union of the Comoros, assisted by
18 co-counsel Haydee Dijkstal, and instructing solicitors from Stoke White Ltd London,
19 Mr Hakan Camuz, Gulden Sonmez and Yakup Bozdog.

20 Thank you, your Honour.

21 PRESIDING JUDGE BOSSA: [10:34:22] Thank you, Counsel.

22 The legal representative for the victims.

23 MR DIXON: [10:34:32] Your Honour, it is the same legal team, Rodney Dixon,
24 assisted by co-counsel Haydee Dijkstal, and Hakan Camuz, Gulden Sonmez and
25 Yakup Bozdog.

1 MS MASSIDDA: [10:34:49] Madam President.

2 PRESIDING JUDGE BOSSA: [10:34:50] Yes.

3 MS MASSIDDA: [10:34:51] For the other group of victims represented by the Office
4 of Public Counsel for Victims attending the hearing today, Ms Anne Grabowski,
5 Mr Alejandro Kiss, Ms Ludovica Vetrucchio, and I am Paolina Massidda.

6 PRESIDING JUDGE BOSSA: [10:35:07] Thank you, Counsel.

7 Today the Appeals Chamber is delivering its judgment on the appeals
8 of the Prosecutor against the Pre-Trial Chamber I's decision entitled "Decision on the
9 Application for Judicial Review by the Government of the Union of the Comoros"
10 rendered on 15 November 2018. In today's summary I will refer to this decision as
11 the impugned decision.

12 I shall now summarise the Appeals Chamber's judgment, taken by majority, with
13 Judge Eboe-Osuji and Judge Ibáñez issuing partly dissenting opinions respectively.
14 This summary is not part of the written judgment, which is the only authoritative
15 account of the Appeals Chamber's ruling and reasons. The written judgment will be
16 made available to the parties and participants at the conclusion of this hearing.

17 By way of introduction and procedural background, States Parties to the
18 Rome Statute may refer situations, in the course of which crimes are alleged to have
19 been committed, to the Prosecutor and request her to initiate an investigation.

20 Article 53(1)(a) of the Statute stipulates the conditions under which the Prosecutor
21 may decide not to initiate an investigation following such a referral. Pursuant to
22 Article 53(3)(a) of the Statute, the referring State Party may request the
23 Pre-Trial Chamber to review the Prosecutor's decision not to initiate an investigation.
24 It also provides that, upon such a review, the Pre-Trial Chamber may request
25 the Prosecutor to reconsider her decision not to initiate an investigation. Rule 108(3)

1 of the Rules provides that the Prosecutor shall communicate the final decision to the
2 Pre-Trial Chamber. The present appeal concerns two issues relating to this
3 procedure.

4 The first issue is the question of whether the Pre-Trial Chamber, (i) having requested
5 the Prosecutor to reconsider her decision; and (ii) having received the Prosecutor's
6 new decision which she considers to be final, may conduct a further review and
7 request the Prosecutor to carry out a reconsideration anew.

8 The second issue is the question of whether the Prosecutor, when reconsidering her
9 decision not to initiate an investigation, is bound by the Pre-Trial Chamber's
10 conclusions on law or fact formulated in its request under Article 53(3)(a)
11 of the Statute.

12 The present appeal arises out of the Prosecutor's decision of 29 November 2017 not to
13 initiate an investigation into the situation regarding the 31 May 2010 Israeli raid on
14 the Humanitarian Aid Flotilla bound for the Gaza Strip, referred to the Prosecutor by
15 the Comoros.

16 Following a request by the Comoros to direct the Prosecutor to reconsider her
17 decision, the Pre-Trial Chamber did so and granted the request of the Comoros.

18 The Prosecutor requested leave to appeal the impugned decision and leave was
19 subsequently granted on the basis of the aforementioned issues.

20 Turning to the merits of the appeal, the Appeals Chamber will address
21 the Prosecutor's grounds of appeal in reverse order.

22 I recall that the Prosecutor's second ground of appeal concerns the power of the
23 Pre-Trial Chamber to request the Prosecutor to reconsider her decision which she
24 considers to be final under Rule 108(3) of the Rules.

25 The Prosecutor essentially submits that the Pre-Trial Chamber erred in invalidating

1 the Prosecutor's 29 November 2017 decision and requiring her to further reconsider
2 her decision not to investigate. According to the Prosecutor, the impugned decision
3 must be reversed because it is *ultra vires*. In the Prosecutor's view, the
4 Pre-Trial Chamber was not competent to entertain a further request from the
5 Comoros and any decision by it other than dismissal *in limine* was therefore wrong in
6 law. In support of this position, the Prosecutor contends that the Pre-Trial Chamber
7 asserted a power to determine the validity of a final decision under Rule 108(3) of
8 the Rules.

9 She avers that the absence of such power can be drawn from the broader context
10 of the Statute and the Rules. In particular, the Prosecutor submits that jurisdiction
11 for judicial review is granted expressly by Article 53(3) of the Statute, which is
12 *lex specialis*. She considers that the Pre-Trial Chamber's approach eliminates the
13 distinction between Articles 53(3)(a) and 53(3)(b) of the Statute. The term "final" in
14 the Statute and the Rules is used, in the Prosecutor's view, to restrict further
15 procedural remedies. She contends that the duty to give reasons in Rule 108(3) is
16 immaterial, and that the Statute does not grant the Pre-Trial Chamber any general
17 power of oversight.

18 The Comoros submits, *inter alia*, that Rule 108 of the Rules does not state that the
19 Prosecutor's final decision is itself non-reviewable if the Prosecutor fails to comply
20 with the Chamber's request for review in the first place.

21 In addition, the Comoros contends that both the Pre-Trial Chamber and the
22 Appeals Chamber oversee the Prosecutor's discretionary powers and more
23 importantly, the Prosecutor is not entrusted under the Statute with the power to
24 interpret the law of the Court.

25 In the view of the victims represented by the OPCV, while the Prosecutor has

1 prerogative powers to decide whether or not to open an investigation, the
2 Pre-Trial Chamber retains powers of oversight and can order her to take particular
3 legal and factual findings into account when conducting a reconsideration of her
4 initial decision. The OPCV submits that the Prosecutor's prerogative to reach the
5 final decision on whether or not to initiate an investigation does not mean that her
6 decisions are immune to review for procedural correctness.

7 In 2015, the Prosecutor's appeal against the decision of the Pre-Trial Chamber
8 requesting a reconsideration which was triggered by the Comoros, was dismissed *in*
9 *limine* by the Appeals Chamber on the basis that it was not a decision on admissibility
10 within the meaning of Article 82(1)(a) of the Statute. In this decision, the
11 Appeals Chamber stated that the relevant drafting history of what eventually became
12 Article 53(3) of the Statute confirmed the view that, while judicial review
13 of the Prosecutor's decision not to investigate should be possible, the ultimate
14 decision as to whether to initiate an investigation is that of the Prosecutor.

15 In the present judgment, the Appeals Chamber affirms this view. Nevertheless, it
16 finds that neither Article 53(3)(a) of the Statute nor Rule 108(3) of the Rules preclude
17 a Pre-Trial Chamber from reviewing whether a decision of the Prosecutor that she
18 considers to be final actually amounts to a proper final decision.

19 The Pre-Trial Chamber's power to review the Prosecutor's decision pursuant to Rule
20 108(3) of the Rules is derived from its statutory power to request reconsideration.
21 The Appeals Chamber considers that a request by the Pre-Trial Chamber under
22 Article 53(3)(a) of the Statute is a judicial decision, which by its very nature imbues
23 the Pre-Trial Chamber with power to once again review the Prosecutor's decision
24 following reconsideration.

25 The scope of the Pre-Trial Chamber's review is, however, limited to establishing

1 whether the Prosecutor carried out the reconsideration in accordance with the
2 Pre-Trial Chamber's request.

3 In the case at hand, the Appeals Chamber finds no merit in the Prosecutor's assertion
4 that the Pre-Trial Chamber lacked the power to set aside her final decision and
5 require her to further reconsider her initial decision.

6 Accordingly, the Prosecutor's second ground of appeal is rejected.

7 Turning to the Prosecutor's first ground of appeal, the question arising is whether
8 when reconsidering a decision not to initiate an investigation, the Prosecutor is bound
9 by the Pre-Trial Chamber's conclusions on law or fact formulated in its request under
10 Article 53(3)(a) of the Statute.

11 The Prosecutor argues that the plain terms of Article 53(3)(a), in their ordinary
12 meaning, make clear that the Pre-Trial Chamber's decision imposes an obligation of
13 process but not of result. The context of the Statute and Rules confirms that an
14 Article 53(3)(a) request does not bind the Prosecutor to the Pre-Trial Chamber's
15 reasoning. In this regard, the Prosecutor submits, *inter alia*, the following:

16 One, that the Pre-Trial Chamber's approach eliminates the distinction between
17 Articles 53(3)(a) and 53(3)(b).

18 Two, that the Pre-Trial Chamber's power to issue requests under Article 53(3)(a)
19 without reviewing the available information is inconsistent with any binding effect of
20 its reasoning.

21 Three, that the duty to give reasons under Rule 108(1) and 108(3) does not justify the
22 Pre-Trial Chamber's interpretation of Article 53(3)(a);

23 And, four, that the Pre-Trial Chamber overlooked the nuanced procedural effects of
24 decisions, especially in matters of judicial review.

25 The Prosecutor further contends that the object and purpose of the Statute confirm

1 that an Article 53(3)(a) request does not bind the Prosecutor to the
2 Pre-Trial Chamber's reasoning, and that this is confirmed by the drafting history
3 of the Statute. In the Prosecutor's view, the Pre-Trial Chamber's error materially
4 affected the impugned decision.

5 The Comoros argues that requiring the Prosecutor to address the legal errors it has
6 committed is a perfectly permissible judicial function. Only the Prosecutor is
7 empowered to decide to initiate an investigation, but if he or she were to disregard
8 these errors in the course of reconsideration, the judicial review proceedings would
9 be redundant and pointless, and this would essentially negate the opportunity
10 afforded to a State Party to challenge that decision under the Statute.

11 The Comoros therefore submits that this ground of appeal should be dismissed,
12 particularly given that the Prosecutor has not established that the Pre-Trial Chamber
13 committed any discernible errors that would warrant the Appeals Chamber's
14 intervention.

15 The victims represented by the OPCV argue that although the core questions under
16 this ground of appeal pertain to a decision of the Pre-Trial Chamber that has become
17 final, the Prosecutor, (i) fails to demonstrate an error; (ii) puts forth arguments that
18 merely disagree with the impugned decision; and further, (iii) challenges parts of
19 a previous ruling, not subject to this appeal.

20 The victims, represented by Mr Dixon, submit that the Prosecutor is plainly not at
21 liberty to refuse to address the errors identified by the Chamber in judicial review
22 proceedings, and that this position does not in any way undermine the independence
23 of the Prosecutor to ultimately decide whether to initiate an investigation. He
24 submits that indeed the Prosecutor has the final say with regard to whether or not
25 investigations should be initiated but notes that, in making her final decision, she is

1 bound to consider the errors highlighted by the Pre-Trial Chamber and discuss them,
2 regardless of the outcome reached.

3 The Appeals Chamber notes that to address the issue under this ground of appeal it is
4 necessary to determine what reconsideration in terms of Article 53(3)(a) of the Statute
5 means, and the manner in which the Prosecutor should take into account
6 a Pre-Trial Chamber's request to reconsider her initial decision not to initiate an
7 investigation. The Statute and the Rules are silent in this regard. Therefore, these
8 questions must be considered within the broader context of the Pre-Trial Chamber's
9 power to review the Prosecutor's initial decision not to initiate an investigation, and
10 the role of the Prosecutor in the preliminary investigation phase of the proceedings.
11 Pursuant to Article 53(3) of the Statute, the Pre-Trial Chamber retains the power to
12 review, under certain circumstances, a decision by the Prosecutor not to initiate an
13 investigation. Where the Prosecutor's decision not to initiate an investigation is
14 based solely on considerations regarding the interests of justice under Article 53(1)(c)
15 of the Statute, the Pre-Trial Chamber's powers to review is robust. A
16 Pre-Trial Chamber may carry out a review on its own motion and the Prosecutor's
17 decision not to investigate shall be effective only if confirmed by the
18 Pre-Trial Chamber.

19 The majority finds, Judge Eboe-Osuji and Judge Ibáñez dissenting, that in contrast,
20 where the Prosecutor's decision not to initiate an investigation is based on the criteria
21 of Article 53(1)(a) or (b) of the Statute, as in the present case, the Pre-Trial Chamber's
22 power of review is more limited, in that:

23 One, the Pre-Trial Chamber may not carry out a review unless requested to do so by
24 the referring State Party or the Security Council;

25 Two, upon review, the Pre-Trial Chamber may only request the Prosecutor to

1 reconsider the decision not to investigate;

2 And three, as the Prosecutor retains the ultimate discretion as to whether to initiate an
3 investigation, the Pre-Trial Chamber cannot direct the Prosecutor as to the result of
4 her reconsideration.

5 Nonetheless, the Appeals Chamber finds that the Pre-Trial Chamber's request for
6 reconsideration pursuant to Article 53(3)(a) of the Statute is more than just a trigger
7 of the Prosecutor's obligation to reconsider her decision. When the Prosecutor
8 conducts a reconsideration of her decision, it will not suffice for her to do so in
9 a perfunctory manner such that the authenticity of the exercise could be questioned.
10 Rather, she is required to demonstrate how she addressed the relevant issues in light
11 of the Pre-Trial Chamber's directions.

12 The Appeals Chamber notes that the Prosecutor's decision whether to initiate an
13 investigation under Articles 53(1)(a) and (b) of the Statute necessarily involves
14 questions of law and fact. The Appeals Chamber considers that where questions of
15 law arise, the only authoritative interpretation of the relevant law is that espoused by
16 the Chambers of this Court and not the Prosecutor. It is therefore not open to
17 the Prosecutor, despite the margin of appreciation that she enjoys in deciding whether
18 to initiate an investigation or not, to disagree with, or fail to adopt, a legal
19 interpretation of the Pre-Trial Chamber that is contained in a request for
20 reconsideration.

21 As far as questions of facts are concerned, the Appeals Chamber considers that the
22 Prosecutor cannot ignore a request by the Pre-Trial Chamber to take into account
23 certain available information when determining whether there is sufficient factual
24 basis to initiate an investigation. However, the majority finds, Judge Eboe-Osuji and
25 Judge Ibáñez dissenting, that it is not for the Pre-Trial Chamber to direct

1 the Prosecutor as to how to assess this information and which factual findings she
2 should reach. Rather, it is primarily for the Prosecutor to evaluate the information
3 made available to her and apply the law where relevant, as interpreted by the
4 Pre-Trial Chamber, to the facts found.

5 To the extent that the Prosecutor's decision is based on assessment of gravity under
6 Article 53(1)(b) read with Article 17(1)(d) of the Statute, the assessment involves the
7 evaluation of numerous factors and information relating thereto, which
8 the Prosecutor has to balance in reaching her decision. In this regard, the majority
9 finds, Judge Eboe-Osuji and Judge Ibáñez dissenting, that the Prosecutor enjoys
10 a margin of appreciation, which the Pre-Trial Chamber has to respect when reviewing
11 the Prosecutor's decision. Accordingly, it is not the role of the Pre-Trial Chamber to
12 direct the Prosecutor as to what result she should reach in the gravity assessment or
13 what weight she should assign to individual factors. The Pre-Trial Chamber may,
14 however, oblige the Prosecutor to take into account certain factors and/or information
15 relating thereto when reconsidering her decision not to initiate an investigation.
16 In the case at hand and for reasons more fully ventilated in the actual judgment on
17 this appeal, the Appeals Chamber finds:

18 That the Prosecutor incorrectly assumed that it was open for her to disagree with the
19 Pre-Trial Chamber's legal interpretation of the standard to be applied by
20 the Prosecutor under Article 53(1) of the Statute and the standard of review under
21 Article 53(3)(a) of the Statute in circumstances where the 16 July 2015 decision had
22 become final;

23 The Appeals Chamber also finds that the unfortunate language used by
24 the Prosecutor to express her disagreement demonstrates that she was entirely
25 misinformed as to what was required of her in conducting the requested

1 reconsideration; and

2 Furthermore, the Appeals Chamber finds, Judge Ibáñez dissenting, that it was
3 inappropriate for the Pre-Trial Chamber to direct the Prosecutor as to how to apply its
4 interpretation of the reasonable basis to proceed standard to the facts, what factual
5 findings she should reach and to suggest the weight to be assigned to certain factors
6 affecting the gravity assessment.

7 In the Appeals Chamber's view, the Prosecutor's failure to follow the
8 Pre-Trial Chamber's legal interpretations affected the Prosecutor's 29 November 2017
9 decision.

10 For that reason, and notwithstanding the fact that the Appeals Chamber agrees with
11 some of the arguments the Prosecutor has raised under this ground of appeal, the
12 Pre-Trial Chamber did not err when it decided to direct the Prosecutor to carry out
13 a new reconsideration of her decision not to investigate. Accordingly, the majority
14 of the Appeals Chamber rejects the Prosecutor's first ground of appeal.

15 For these reasons, the Appeals Chamber confirms the impugned decision, with Judge
16 Eboe-Osuji and Judge Ibáñez issuing partly dissenting opinions.

17 (Pause in proceedings)

18 PRESIDING JUDGE BOSSA: [11:00:26] For these reasons, the Appeals Chamber
19 confirms the impugned decision, with Judge Eboe-Osuji and Judge Ibáñez issuing
20 partly dissenting opinions. Judge Eboe-Osuji appends a partly dissenting opinion to
21 this judgment, while Judge Ibáñez will issue her partly dissenting opinion in due
22 course.

23 The Prosecution is directed to reconsider her decision in accordance with the
24 16 July 2016 decision of the Pre-Trial Chamber and this Appeals Chamber judgment
25 issued today by 2 December 2019.

- 1 This concludes my summary of the judgment. I wish to thank the legal team of the
- 2 Appeals Chamber, all counsel, the interpreters, court reporters, the Registry staff, and
- 3 parties and participants for the role they have played in this case.
- 4 I now declare this session closed.
- 5 THE COURT USHER: [11:01:41] All rise.
- 6 (The hearing ends in open session at 11.01 a.m.)