

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **3 August 2015**

**THE APPEALS CHAMBER**

**Before:** Judge Christine Van Den Wyngaert, Presiding Judge  
Judge Sanji Mmasenono Monageng  
Judge Silvia Fernández de Gurmendi  
Judge Howard Morrison  
Judge Piotr Hofmański

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

**Public Document**

**Application by the Government of the Comoros to dismiss *in limine* the  
Prosecution “Notice of Appeal of ‘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)”**

**Source:** Sir Geoffrey Nice QC, Rodney Dixon QC, and Stoke & White LLP  
(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:**

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**REGISTRY**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Government of the Union of the Comoros hereby applies for the Prosecution's "Notice of Appeal of '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)"<sup>1</sup> to be dismissed *in limine* on the grounds that the Prosecution has no basis at all under the plain terms of the Statute and the Rules, and given the explicit case law on point, to seek to appeal the impugned decision under Article 82(1)(a), as of right directly to the Appeals Chamber, as the decision is *not* a decision "with respect to ... admissibility."<sup>2</sup>
2. The Government of the Comoros therefore requests that the Appeals Chamber dismiss the appeal as filed under Article 82(1)(a) without there being any need to receive and consider the document in support of the appeal and the merits of the appeal, given that the Appeals Chamber has no jurisdiction under the Statute, Rules and case law of the ICC to hear the appeal pursuant to Article 82(1)(a).
3. The Prosecution has improperly filed the present appeal against the Pre-Trial Chamber's decision on the Request for Review<sup>3</sup> to the Appeals Chamber directly under Article 82(1)(a) when the only course of appeal was to have sought leave to appeal from the Pre-Trial Chamber under Article 82(1)(d) of the Statute. As explained below, the impugned decision is plainly not a decision "with regard to admissibility", however hard the Prosecution tries to make out that it is. As the ICC's case law has consistently made unmistakably clear, a party can only appeal directly to the Appeals Chamber pursuant to Article 82(1)(a) when the decision constitutes a final determination by the Pre-Trial Chamber of whether the case is actually admissible or not. The Appeals Chamber has emphasised that no other decisions which may deal with admissibility issues can be appealed under Article 82(1)(a) directly to the Appeals Chamber. The present decision is merely a decision requesting the Prosecutor to reconsider her decision not to initiate an

<sup>1</sup> Notice of Appeal of '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), ICC-01/13-35, 27 July 2015 (hereinafter "Notice of Appeal").

<sup>2</sup> See, Article 82(1)(a).

<sup>3</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 on Request for Review").

investigation pursuant to Article 53 – it is accordingly clearly *not* a final decision on whether the case is admissible or not. There is not even a ‘case’ to speak of at the present stage in the proceedings – the Prosecutor has only been asked to reconsider her decision and in her preliminary examination to re-examine whether she should open an investigation.

4. The Government of the Comoros thus submits that the Appeals Chamber should find that the impugned decision is not a “decision with regard to admissibility” and should dismiss the Prosecution’s appeal under Article 82(1)(a). The Prosecution can then get on with reconsidering her decision and informing the parties of the outcome as soon as possible.

## **II. PROCEDURE FOR DISMISSING THE APPEAL IN LIMINE**

5. It is well-established by the Appeals Chamber that an appeal can be dismissed *in limine* without having to address the merits of the appeal. The Appeals Chamber has previously determined under Regulation 28 to dismiss an appeal made pursuant to Article 82(1)(a) before addressing the merits.
6. The Appeals Chamber has held that “*before addressing any other issue in the appeal, it is necessary to examine in limine whether the appeal is admissible.*”<sup>4</sup> In considering whether it had jurisdiction to hear the appeal, the Appeals Chamber suspended further submissions from the parties on the merits of the appeal and stated that “[s]ubject to the decision of the Appeals Chamber on the admissibility of the present appeal, directions will be given ... with regard to the submission of the document in support of the appeal and the time within which it may be filed”.<sup>5</sup>
7. The Government of the Comoros submits that it is entirely appropriate for the Appeals Chamber to follow this procedure in the present case for reasons of

<sup>4</sup> Prosecutor v. Gaddafi and Al-Senussi, Directions of the Appeals Chamber, ICC-01/11-01/11-64, 23 February 2012, p. 3; Situation in the Republic of Kenya, Directions of the Appeals Chamber, ICC-01/09-74, 12 July 2011, p. 3.

<sup>5</sup> Prosecutor v. Gaddafi and Al-Senussi, Directions of the Appeals Chamber, ICC-01/11-01/11-64, 23 February 2012, p. 3; Situation in the Republic of Kenya, Directions of the Appeals Chamber, ICC-01/09-74, 12 July 2011, p. 3.

judicial economy, and so that no further time and resources are spent on an inadmissible appeal when the Prosecution should be taking steps to meet its obligations under Rule 108(2) to “*reconsider that decision as soon as possible.*”<sup>6</sup> The Prosecution has itself advocated this procedure as the most appropriate way of deciding on the admissibility of appeals pursuant Article 82(1)(a) and determining whether the appeal should be dismissed *in limine*.<sup>7</sup>

8. The Prosecution acknowledges in its Notice of Appeal that it has “*depart[ed] ... from its usual practice under regulation 64(1)*” in setting out in detail the reasons “*why it considers this appeal to be admissible*” in the Notice of Appeal. The Prosecution notes only that its grounds of appeal need to be further elaborated in its document in support of appeal.<sup>8</sup> The Government of the Comoros submits that the Appeals Chamber should thus now consider both the Prosecution’s and Government of Comoros’s submissions on whether the appeal is admissible under Article 82(1)(a) and render a decision accordingly on the admissibility of the appeal before the matter proceeds any further, and before receiving the parties’ submission on the grounds of appeal and considering the merits of the appeal.<sup>9</sup>

### **III. THE APPEAL SHOULD BE DISMISSED IN LIMINE**

9. The Prosecution’s appeal very clearly does not come within the scope of Article 82(1)(a). There is no right of appeal directly to the Appeals Chamber against the impugned decision under this provision or any other provision of the Statute, the Rules or the Regulations. The jurisprudence of the Appeals Chamber on what constitutes a “decision with respect to admissibility” stands firmly against any attempt by the Prosecution to claim that its appeal can be submitted directly to

<sup>6</sup> Rules of Procedure and Evidence, Rule 108(2). See also, Decision on Request for Review, para. 50.

<sup>7</sup> Prosecutor v. Katanga, Prosecution’s request to provide observations to the admissibility of “Acte d’appel des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 contre la ‘Décision relative à la demande de mise en liberté des témoins détenus DRC-D02- P-0236, DRC-D02-P-0228 et DRC-D02-P-0350’ rendue par la Chambre de première instance II en date du 1er octobre 2013 (ICC-01/04-01/07-3405)”, para. 3.

<sup>8</sup> Notice of Appeal, paras. 6, 7.

<sup>9</sup> The Government of the Comoros reserves the right to file its response in full to the grounds of appeal in the event that is required in accordance with Rule 154 and Regulation 64.

the Appeals Chamber under Article 82(1)(a). The present appeal must therefore be rejected *in limine* as being inadmissible.

10. The Prosecution's Notice of Appeal claims that its appeal under Article 82(1)(a) is admissible because of the "centrality of the question of admissibility to the Decision"<sup>10</sup>, a phrase not drawn from ICC jurisprudence but by which the Prosecution would seek to circumnavigate the known provisions of that jurisprudence. As the Prosecution must know, this is not the test as established by the Appeals Chamber for accepting an appeal under Article 82(1)(a). The Prosecution has completely misconstrued and inaccurately cited the Appeals Chamber's own decisions on point.
11. The Appeals Chamber has consistently found that only final decisions on the admissibility of a case – i.e. decisions which make a conclusive determination that a case is either admissible or inadmissible, nothing less – are subject to appeal under Article 82(1)(a).<sup>11</sup> In the Kenya Situation, the Appeals Chamber clearly stated that "*a decision of a Pre-Trial or Trial Chamber may constitute a 'decision with respect to [...] admissibility' only to the extent that it consisted of or 'was based on' a ruling that a case was admissible or inadmissible.*"<sup>12</sup> In the Libya Situation, the Appeals Chamber similarly reaffirmed the need for a conclusive and final decision on admissibility. It held that a ruling on either the admissibility or inadmissibility of Mr. Gaddafi's case was "*required for a decision to be appealed under article 82 (1) (a) of the Statute.*"<sup>13</sup>
12. The Appeals Chamber has emphasised that the 'affect' or 'impact' a decision has on the question of admissibility – no matter how central it is to a subsequent

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<sup>10</sup> Notice of Appeal, para. 10.

<sup>11</sup> As set out in the case law referred to in this Application, and highlighted in academic writing: see, The ICC Prosecutor should Reject Judges' Decision in Mavi Marmara, Just Security, Alex Whiting, last paragraph (<https://www.justsecurity.org/24778/icc-prosecutor-reject-judges-decision-mavi-marmara/>).

<sup>12</sup> Decision on the admissibility of the 'Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence'', ICC-01/09-78, 10 August 2011, para. 15.

<sup>13</sup> Decision on "Government of Libya's Appeal Against the "Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi" of 10 April 2012, para. 15.

admissibility decision – is not sufficient to permit an appeal under Article 82(1)(a) of that decision without it being itself a conclusive decision made on the admissibility of the case.<sup>14</sup> The Appeals Chamber stated that “[e]ven if the ultimate impact of a decision of a Pre-Trial or Trial Chamber were to affect the admissibility of cases, that fact would not, in and of itself, render the decision a ‘decision with respect to [...] admissibility’ under article 82 (1) (a).”<sup>15</sup>

13. The Prosecution evidently recognises this unambiguous requirement in the case law, as its Notice of Appeal attempts to argue that the impugned decision makes a final or conclusive decision on admissibility. The Prosecution asserts that the “[d]ecision is based on the Pre-Trial Chamber’s view, by majority, that any potential case or cases arising from this situation are admissible.”<sup>16</sup> This argument is patently wrong. The Pre-Trial Chamber has definitely not made any final decision on the admissibility of the case. As set out in the impugned decision, the “subject-matter” and “object and purpose” of the Pre-Trial Chamber’s decision was “to review the Prosecutor’s decision not to proceed under article 53(1) of the Statute and to request the Prosecutor to reconsider that decision”.<sup>17</sup> No decision has been made about the admissibility of the case. The Prosecutor is only requested to reconsider her decision and then inform the parties of her decision. At no point in the impugned decision did the Pre-Trial Chamber make any determination on whether potential cases were admissible or inadmissible.

14. The Prosecution seeks to base the current appeal on a previous decision by Pre-Trial Chamber I declining an arrest warrant against *Bosco Ntaganda*.<sup>18</sup> This is a manifestly contorted argument that misrepresents the case law. The decision in *Ntaganda* is clearly distinguishable from the present case because “the decision by the Pre-Trial Chamber to reject the Prosecutor’s application in respect of Mr.

<sup>14</sup> See, Decision on the admissibility of the ‘Appeal Against Decision on Application Under Rule 103’ of Ms Mishana Hosseinioun of 7 February 2012, ICC-01/11-01/11-74, 9 March 2012, para. 11.

<sup>15</sup> Decision on the admissibility of the ‘Appeal of the Government of Kenya against the ‘Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence’’, ICC-01/09-78, 10 August 2011, para. 17.

<sup>16</sup> Notice of Appeal, para. 8.

<sup>17</sup> Decision on Request for Review, paras. 8 and 9.

<sup>18</sup> See Notice of Appeal, para. 11.

*Bosco Ntaganda was based on a ruling of the admissibility of the case against him*<sup>19</sup> – that the “*case against him is inadmissible.*”<sup>20</sup>

15. There is no ruling on the admissibility of the case in the impugned decision – it is a decision about whether the Prosecutor should be requested to reconsider her decision not to initiate an investigation. There is no proper way to rely on the *Ntaganda* decision in support of the present appeal being admissible before the Appeals Chamber.
16. The errors identified by the Pre-Trial Chamber (by majority) in reaching its decision to request reconsideration, both individually and cumulatively, do not in any way amount to a final decision on whether potential cases are admissible or inadmissible. They all concern the reasons for the Prosecutor’s decision and lead to the conclusion that the Prosecutor should be requested to reconsider her decision; in particular,
  - The Pre-Trial Chamber found that the Prosecution’s conclusion on whether there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment were “*surprisingly premature*” and that the “*proper differentiation between this crime and the war crime of outrages upon personal dignity under article 8(2)(b)(xxi) of the Statute (which according to the Prosecutor is sufficiently demonstrated) involves the application of a threshold to the level of severity of the pain and suffering inflicted by the conduct in question and cannot credibly be attempted on the basis of the limited information available at this stage.*”<sup>21</sup>
  - The Pre-Trial Chamber stated that the Prosecution “*willfully ignored*” evidence of the shooting of live ammunition from helicopters and requested the Prosecution to review this evidence as being “*material to the*

<sup>19</sup> Situation in the Democratic Republic of the Congo, ‘Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’’, 13 July 2006, ICC-01/04-169 (OA), para. 18.

<sup>20</sup> Situation in the Democratic Republic of the Congo, ‘Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’’, 13 July 2006, ICC-01/04-169 (OA), para. 8.

<sup>21</sup> Decision on Request for Review, para. 30.



*determination of whether there was a prior intent and plan to attack and kill unarmed civilians – something that informs the Prosecutor’s conclusions with respect to the manner of commission of crimes and, in turn, the ultimate determination that the potential case(s) would not be of sufficient gravity.”*<sup>22</sup>

- The Pre-Trial Chamber held that “*at the present stage*” the Prosecution’s conclusion on the systematic abuse of detained passengers from the *Mavi Marmara* was “*unreasonable*” in all of the circumstances considered by the Chamber, without further investigation.<sup>23</sup>

17. Although the Prosecution cites passages of the impugned decision in which it purports show that the Pre-Trial Chamber made a conclusive determination on the admissibility of potential cases, these passages all indicate quite the opposite and demonstrate that the Pre-Trial Chamber’s decision goes no further than potentially ‘impacting’ or ‘affecting’ a possible admissibility decision in the future, if that ever arose. The passages cited (see footnote 4, for example) show that the Pre-Trial Chamber addressed such issues as whether there is as yet shown to be a reasonable basis to believe that torture or inhuman treatment was committed and that the crimes were systematic or part of a plan or policy, and whether the number of victims and impact of the crimes could be relevant to the gravity of the case. These issues are merely, at most, issues which might ‘affect’ and ‘impact’ admissibility, and as per the jurisprudence of the Appeals Chamber fall squarely within the category of issues which may “ultimately impact” or “affect the admissibility of the case”<sup>24</sup> and therefore do not qualify to be appealed as of right under Article 82(1)(a).

18. The decisions above are of a category that the Pre Trial Chamber should be expected to reach and to articulate when responding to an application of the kind made by Comoros in order to explain why the Prosecutor should reconsider her

<sup>22</sup> Decision on Request for Review, para. 34.

<sup>23</sup> Decision on Request for Review, para. 38.

<sup>24</sup> Decision on the admissibility of the ‘Appeal of the Government of Kenya against the ‘Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence’’, ICC-01/09-78, 10 August 2011, para. 17.

decision. It is by such decisions that the Pre-Trial Chamber justifies its requiring the Prosecutor to reconsider her decision, including by her assessing existing evidence again or by conducting necessary further inquiries, all in order to ‘think again’. It is by such decisions that the Pre-Trial Chamber may assist the Prosecutor where she and her staff may have fallen short in performance of the duty owed by the Court as a whole to potential victims of justiciable international crimes that may properly be tried at the ICC.

19. Any decision on admissibility can only ever be taken by the Pre-Trial Chamber, should this issue ever arise in the present Situation, *after* the Prosecutor has reconsidered her decision not to open an investigation as requested by the Pre-Trial Chamber. Even though the Pre-Trial Chamber stated that the errors found “*materially affect the validity of the Prosecutor’s conclusion that the potential case(s) arising from the situation referred to her by the Comoros would not be of sufficient gravity to justify further action by the Court,*”<sup>25</sup> this is clearly not a decision about whether the case is admissible. Rather, the Chamber has asked the Prosecutor to reconsider the evidence and “*her decision not to initiate an investigation*”<sup>26</sup> which includes assessing whether the case is admissible. The Prosecutor still has to make a decision on admissibility, and only thereafter could the Chamber ever be required to make a decision on admissibility itself if the issue was brought before it. Expressed differently, the Pre-Trial Chamber is in no position even to begin to rule on the correctness of a decision of the Prosecutor on admissibility that the Prosecutor has herself – manifestly and on her own account – not yet made.
  
20. The Appeals Chamber has required that a “decision with regard to admissibility” should be based on a specific decision under Articles 18 or 19. It is thus erroneous for the Prosecution to assert that it does not matter that the impugned decision did not rely on Articles 18 or 19. In the Kenya Situation, the Appeals Chamber dismissed an Article 82(1)(a) appeal as inadmissible because the impugned decision from the Pre-Trial Chamber “*neither decided on the admissibility of any case pursuant to article 19 of the Statute nor issued a*

<sup>25</sup> Decision on Request for Review, para. 49.

<sup>26</sup> Decision on Request for Review, para. 50.

*preliminary ruling on admissibility pursuant to article 18 of the Statute.”*<sup>27</sup> In the present case the Pre-Trial Chamber’s decision has been rendered under Article 53. The Prosecution has provided no authority to support its assertion that the impugned decision need not make a conclusive determination under Articles 18 or 19, and only cites to case law which actually reinforces the Appeals Chamber’s unwavering stance that “*the right to appeal a decision on ... admissibility is intended to be limited only to those instances in which a Pre-Trial Chamber ... issues a ruling specifically on ... the admissibility of the case.*”<sup>28</sup>

21. Furthermore, the Prosecution cannot rely on an argument that the appeal is “necessary” and “important”<sup>29</sup> as a basis for it somehow being admissible under Article 82(1)(a). Nothing in the Statute, Rules or Regulations allows an appeal as of right on the basis that it may be “necessary” or “important”. As the Prosecution has itself repeatedly argued before the Appeals Chamber, appeals directly to the Appeals Chamber are only permitted in the particular circumstances provided for in the express provisions of the Statute, Rules and Regulations, and on no other grounds. Appeals that fall outside these provisions can only be pursued with the leave of the Pre-Trial Chamber or Trial Chamber pursuant Article 82(1)(d).
22. There is in any event nothing so “important” about the Prosecution’s proposed grounds of appeal that are decidedly unpersuasive and misdirected.<sup>30</sup> The Prosecutor has only been requested to reconsider her decision not to open an investigation. She has not been ordered to investigate any crimes – the decision to open an investigation remains hers and is entirely within her discretion. The

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<sup>27</sup> Decision on the admissibility of the ‘Appeal of the Government of Kenya against the ‘Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence’, ICC-01/09-78, 10 August 2011, para. 18.

<sup>28</sup> Decision on the admissibility of the ‘Appeal of the Government of Kenya against the ‘Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence’, ICC-01/09-78, 10 August 2011, para. 16.

<sup>29</sup> See, Notice of Appeal, paras. 3, 4.

<sup>30</sup> The Comoros will respond to the grounds of appeal themselves pursuant to Regulation 64 should that be required.

Chamber has pointed to relevant evidence and important factors which it has requested her to take into account when reconsidering her decision.

23. It is most surprising that given the wide-ranging and convincing evidence *prima facie* of so many victims of the attack, the Prosecutor has chosen to refuse even to reconsider her decision, and instead has mounted an appeal based on no authority at all, and on grounds which have in fact previously been rejected by the Appeals Chamber as a basis for it to hear such an appeal. It is hoped that the Prosecutor's disregard in her notice of appeal for the Pre-Trial Chamber's requests, entirely reasonable as those requests are, will not stand in the way of the Prosecutor examining the evidence in the present Situation in full accordance with her mandate under the Statute, as highlighted by the Majority of the Pre-Trial Chamber in its conclusion.<sup>31</sup>
  
24. This appeal – if allowed and successful – would block further access to the ICC by victims of very serious crimes, as acknowledged by the Prosecutor may have happened, without a proper consideration of available and accessible material. This would be contrary to both the underlying purpose as well as to the strict statutory provisions that direct the Court's work.
  
25. It is particularly unfortunate that the Prosecutor has, by this appeal, sought to avoid exercising her discretionary powers properly in a case of great importance to individual victims on the basis of the best evidence available and accessible to her, where victims have waited 18 months for her initial decision and where the instant case may be viewed as part of a wider conflict over which ICC jurisdiction is seen as sensitive given the interests of the Israeli authorities and armed forces, and their supporters, in that wider conflict. As has been expressed by the victims in their submissions to the Court<sup>32</sup>, they have hoped for the Court to operate in their case in accordance with the Statute and the rule of law that obliges the Prosecutor to investigate cases of sufficient gravity irrespective of who may be the alleged perpetrators. They have been most concerned that the

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<sup>31</sup> Decision on Request for Review, paras. 50, 51.

<sup>32</sup> Victim Observations pursuant to 'Decision on Victims' Participation' of 24 April 2015, ICC-01/13-28-Red, 22 June 2015, paras. 6, 8 10.

actions of the IDF should not be above the law.<sup>33</sup> All that the victims have asked of the Prosecutor is that grave crimes committed on the high seas against unarmed civilians be investigated. By its decision the Pre-Trial Chamber effectively confirmed their right to make that request and to have the Prosecutor perform her function properly and diligently. The prospect of the Prosecutor avoiding performing this basic task will greatly disappoint victims and may fuel concerns about the Court more generally.

#### IV. CONCLUSION

26. For all of the reasons set out above, the Government of the Comoros respectfully requests the Appeals Chamber to dismiss *in limine* the Prosecution's appeal under Article 82(1)(a) as being inadmissible on the grounds that the impugned decision is clearly not a "decision with regard to admissibility".




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**Sir Geoffrey Nice QC**  
**Rodney Dixon QC**

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

Dated 3 August 2015

London

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<sup>33</sup> Victim Observations pursuant to 'Decision on Victims' Participation' of 24 April 2015, ICC-01/13-28-Red, 22 June 2015, paras. 6, 8 10.