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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

**Response of the Government of the Comoros to the “Prosecution’s Further
Submissions concerning Admissibility”**

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:**

The Office of the Prosecutor

Ms. Fatou Bensouda, Prosecutor
Ms. Helen Brady

Counsel for the Defence

Legal Representatives of Victims

Sir Geoffrey Nice QC
Mr. Rodney Dixon QC

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda
Mr. Enrique Carnero Rojo

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

States Representatives

Sir Geoffrey Nice QC
Mr. Rodney Dixon QC

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

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I. INTRODUCTION

1. The Government of the Union of the Comoros hereby files this response to the “Prosecution’s Further Submissions concerning Admissibility”¹ in accordance with the Appeals Chamber’s “Directions on the conduct of proceedings” which granted the Government of the Comoros the right to file a response by 19 August 2015 “[s]hould the Prosecutor file further submissions on the admissibility of the Appeal.”²
2. The Prosecution’s further submissions add nothing of any substance or value to its Notice of Appeal. Although the Prosecution had already set out the grounds on which it considered the appeal to be admissible³ and despite having indicated that its arguments on the admissibility of the appeal were explained in full⁴, the Prosecution has nevertheless now added further submissions. These arguments are a strained and seemingly desperate attempt to salvage a flawed appeal.
3. The Government of the Comoros incorporates all of its previous submissions in this response. There is no need to repeat arguments for why the appeal should be dismissed. The Prosecution has improperly filed its appeal under Article 82(1)(a)⁵ and the Appeals Chamber’s

¹ Prosecution’s Further Submissions concerning Admissibility, ICC-01/13-47, 14 August 2015 (hereinafter “Prosecution further submissions”).

² Directions on the conduct of proceedings, ICC-01/13-42, 6 August 2015, para. 3.

³ 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, para. 6 (hereinafter “Notice of Appeal”).

⁴ Notice of Appeal, para. 7; and Prosecution’s Urgent Response to the Government of the Union of the Comoros’ Application to Dismiss the Appeal *In Limine*, and Request for Extension of Pages under Regulation 37 of the Regulations of the Court, ICC-01/13-40, 4 August 2015, para. 1.

⁵ 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

jurisprudence offers no support at all for the Prosecution's position, no matter how much the Prosecution unfortunately contorts – almost as if to twist – the reasoning of the Court. The Pre-Trial Chamber's decision is *not* a ruling that declares the case admissible. The Appeals Chamber should thus dismiss the appeal *in limine*.

II. SUBMISSIONS IN RESPONSE

4. As noted above, no useful purpose is served by repeating the Government of the Comoros' submissions. This response only corrects the erroneous assertions made in the Prosecution's further submissions.
5. The Prosecution now accepts that a "decision with respect to admissibility" must be "*based on a clear and unequivocal ruling on admissibility*".⁶ Previously, the Prosecution had stopped short of making this concession by stating that the present appeal was admissible under Article 82(1)(a) because of the "*centrality of the question of admissibility to the Decision*"⁷. In its further submissions the Prosecution attempts to argue that the Pre-Trial Chamber has made an affirmative decision that the potential cases are admissible – the Prosecution now asserts that the impugned decision "*plainly constituted a 'ruling' on admissibility*" because "*the majority of the Pre-Trial Chamber declared that potential case(s) arising from this situation are sufficiently grave to be heard by this Court and thus, in that respect, admissible.*"⁸

decision not to initiate an investigation' (ICC-01/13-34)", ICC-01/13-39, 3 August 2015, paras. 1-4, 9, 26 (hereinafter "Application to dismiss appeal in limine").

⁶ Prosecution further submissions, para. 5.

⁷ Notice of Appeal, para. 10.

⁸ Prosecution further submissions, para. 27. See also, para. 5 which states that "*It is based on a clear and unequivocal ruling on admissibility, concluding that any potential case arising from this situation is sufficiently grave to be heard before this Court.*"

6. As the Prosecution must know, this argument is false. The Pre-Trial Chamber cannot make any ruling on the admissibility of the case in the review proceedings under Article 53. Although the Government of the Comoros would wish that the Pre-Trial Chamber could have, and did, decide that the case was admissible before the Court, this is simply not the reality under the plain terms of Article 53(3)(a) and the explicit language of the Pre-Trial Chamber's decision based on this Article.

7. The essence of Article 53(3)(a) is that Pre-Trial Chamber cannot overrule the Prosecutor and make any binding ruling on whether an investigation must be opened. Its powers are expressly restricted to requesting the Prosecution only to *reconsider* its decision.⁹ The matter is then left entirely for the Prosecution to decide if such a request is made. The Pre-Trial Chamber has without any doubt *not* determined the admissibility of the case. The unmistakable terms and wording of the Pre-Trial Chamber's decision is to request the Prosecutor to reconsider her decision not to open an investigation.

8. The Prosecution has also misconstrued the submissions of the Government of the Comoros on what constitutes a 'decision' or 'ruling' on admissibility.¹⁰ The Comoros has not argued that only final decisions for all time come within the ambit of Article 82(1)(a).¹¹ As previously held by the Appeals Chamber, the Comoros has submitted that only decisions on whether the case is admissible or not at the time that such

⁹ See, Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute, ICC-01/13-14-Red, 30 March 2015, para. 13.

¹⁰ Application to dismiss appeal in limine, para. 11.

¹¹ Prosecution further submissions, para. 23.

decisions are made in the proceedings, may be appealed under Article 82(1)(a). Even if the issue of admissibility is ‘central’ to the decision, it is not sufficient to permit a party to rely on the provisions of Article 82(1)(a). This is the key distinction that has been made by the Appeals Chamber, and which means that the present decision cannot be appealed under Article 82(1)(a).

9. The Prosecution’s use of the word ‘ruling’ – “[a]n authoritative decision or pronouncement, [especially] one made by a judge”¹² – seeks to leave open the possibility that a ‘ruling’ on admissibility need not decide whether a case is admissible or not. But this would be patently inconsistent with the jurisprudence of the Appeals Chamber¹³, and would fall under that category of decision which impacts or affects a potential decision on admissibility that is not appealable under Article 82(1)(a).¹⁴ A decision must therefore be ‘final’ or ‘conclusive’ in that it must determine whether the case is admissible or not at the stage in the proceedings in which the matter is being considered.

¹² Prosecution further submissions, para. 18.

¹³ See, Situation in the Republic of Kenya, 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 (hereinafter “Kenya decision”); Prosecutor v. Gaddafi et al., 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, ICC-01/11-01/11-126, 25 April 2012, para. 13; Prosecutor v. Gaddafi et al., 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. 10; Prosecutor v. Katanga, Decision on the admissibility of the appeal against the “Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRCD02-P0228 and DRC-D02-P0350”, ICC-01/04-01/07-3424, 20 January 2014, para. 33; 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.

¹⁴ See, Application to dismiss in limine, para. 12. See also, Kenya decision, para. 17.

10. The Prosecution for the very first time postulates criteria for a decision being appealable under Article 82(1)(a)¹⁵ by purporting to rely on the Appeals Chamber's decision in the Kenya Situation¹⁶, namely that:

*"the operative part of the decision itself must pertain directly to a question on [...] admissibility" (first Kenya criterion); ... an indirect or tangential link" between the decision and a question of admissibility will not suffice (second Kenya criterion); ... [and that] "[i]t is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a)" (third Kenya criterion)."*¹⁷

11. As set out in the Comoros' application to dismiss the appeal¹⁸, the present decision manifestly does not meet the criteria established by the Appeals Chamber in the Kenya Situation. The Prosecution has now selectively drawn from the *Kenya* decision to attempt to show that it has somehow met the Court's criteria in the present case.
12. With regard to the first criteria, the Prosecution has artificially picked just one line from paragraph 15 of the *Kenya* decision – *"the operative part of the decision itself must pertain directly to a question on [...] admissibility"* – to try to suggest that no decision on the admissibility of the case is required. The Prosecution completely ignores that this paragraph goes on to state 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"* and that this is further emphasised by the *"French version of article 82(1)(a) of the Statute [which] confirms this interpretation as it provides that a party may only*

¹⁵ See, Prosecution further submissions, paras. 8, 9.

¹⁶ See, Kenya decision, paras. 15-18.

¹⁷ Prosecution further submissions, paras. 8, 9.

¹⁸ Application to dismiss appeal in limine, paras. 3, 9, 11, 12, 15-20.

appeal a '[d]écision sur la compétence ou la recevabilité.'"¹⁹ It should also be noted that all of the sources cited by the Prosecution explicitly state that the decision must include a ruling that a case is admissible or inadmissible.²⁰

13. The Prosecution, without any source or citation to support its submission, goes so far as to argue that the operative part of a decision "*should not be understood formalistically*" and that the decision does not even need to "*make express reference to admissibility in its disposition.*"²¹ This argument is in direct contradiction to the Appeals Chamber's consistent finding that the impugned decision must constitute "*a ruling that a case was admissible or inadmissible.*"²² How, the Prosecution might have explained, do courts pronounce on an issue like 'admissibility' without saying that they are doing precisely that? Where is the line of juridical reasoning to support the suggestion that court rulings should be obscured by leaving out of rulings the precise word that the ruling requires for readers to understand the ruling.

¹⁹ See, Kenya decision, para. 15 (emphasis added).

²⁰ See, Prosecution further submissions, footnote 6. Note that the "First *Libya* Appeal Decision" para. 10, the "Second *Libya* Appeal Decision" paras. 13-14 and the "*Katanga* Appeal Decision" para. 33 which are all cited in support of the first criteria in footnote 6 of the Prosecution further submission each explicitly refer to paragraph 15 of the Kenya decision, and particularly to the passage which states 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.*"

²¹ Prosecution further submissions, para. 9.

²² Kenya decision, para. 15. See also, Prosecutor v. Gaddafi et al., 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, ICC-01/11-01/11-126, 25 April 2012, para. 13; Prosecutor v. Gaddafi et al., 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. 10; Prosecutor v. Katanga, Decision on the admissibility of the appeal against the 'Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRCD02-P0228 and DRC-D02-P0350', ICC-01/04-01/07-3424, 20 January 2014, para. 33.

14. The Prosecution continues to rely on the Appeals Chamber's decision in the *DRC Situation*, but this decision explicitly undercuts the Prosecution's argument as it found that the impugned decision in that case made a definitive ruling on admissibility, namely that the potential case against Bosco Ntaganda was inadmissible.²³

15. The Prosecution has also distorted the Appeals Chamber's jurisprudence in respect of the "third *Kenya* criterion".²⁴ The Prosecution cites to paragraph 17 of the *Kenya* decision – in particular, the passage which states that "[i]t is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a)." ²⁵ Based on this single selected passage the Prosecution seeks to argue that the present appeal can somehow be squeezed within the ambit of Article 82(1)(a). The Prosecution claims that the Appeals Chamber's decision "emphasises that the procedural consequences of the decision are not the determining factor" and that a decision does not "fail to be appealable under article 82(1)(a) if it is based on a ruling of admissibility but also has a more discrete procedural consequence."²⁶

16. There is no support at all in the Appeals Chamber's case law for this view. Moreover, the Prosecution entirely overlooks that the Appeals Chamber squarely dealt with this issue by explaining in this decision that "Even 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

²³ 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), paras. 9, 18.

²⁴ Prosecution further submissions, paras. 8, 9.

²⁵ Prosecution further submissions, paras. 8, 9. See, *Kenya* decision, para. 17.

²⁶ Prosecution further submissions, para. 9.

*decision a 'decision with respect to [...] admissibility' under article 82(1)(a)."*²⁷

No matter how central the question of admissibility is to a decision, and therefore, how much the decision 'affects' or 'impacts' an ultimate decision on admissibility, this is not sufficient to permit an appeal under Article 82(1)(a).²⁸

III. CONCLUSION

17. Accordingly, the Government of the Comoros submits that the Prosecution's further submissions should be rejected. They provide no grounds for the appeal being admissible. The Comoros respectfully requests the Appeals Chamber to dismiss *in limine* the Prosecution's appeal under Article 82(1)(a) as being inadmissible.

Word Count: 2678²⁹



Sir Geoffrey Nice QC

Rodney Dixon QC

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

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London

²⁷ Kenya decision, para. 17.

²⁸ See, Application to dismiss appeal in limine, paras. 12, 13.

²⁹ The Government of the Comoros hereby makes the required certification: ICC-01/11-01/11-565 OA6, para.32.